# Petition

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

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RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

*v.*

CARMEN CAMPBELL

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTION PRESENTED

Whether the Secretary of Health and Human Services may in appropriate cases rely upon published medical-vocational guidelines, rather than individualized proof, to determine whether a claimant for disability benefits under the Social Security Act is able to perform substantial gainful work in the national economy.

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CARMEN CAMPBELL

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 665 F.2d 48. The opinion of the district court (App. B, *infra*, 12a-14a) is unreported. The decisions of the Social Security Administration Appeals Council (App. C, *infra*, 16a-19a) and the Administrative Law Judge (App. D, *infra*, 20a-29a) are unreported.

## JURISDICTION

The judgment of the court of appeals (App. E, *infra*, 32a-33a) was entered on November 30, 1981. A petition for rehearing was denied on February 11, 1982 (App. E, *infra*, 30a-31a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 205(a) and 223(d) of the Social Security Act, 42 U.S.C. 405(a) and 423(d); 20 C.F.R. 404.1545; 20 C.F.R. 404.1560 to 404.1568; and 20 C.F.R. Part 404, Subpart P, Appendix 2, are reproduced in Appendix F, *infra*, 34a-75a.

## STATEMENT

1. Titles II and XVI of the Social Security Act provide disability benefits to insured individuals who, because of a physical or mental impairment, are unable to do their previous work or to "engage in any * * * kind of substantial gainful work which exists in the national economy * * *." 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B). In determining whether a claimant is disabled, the Act requires the Secretary of Health and Human Services to consider, in addition to a claimant's physical or mental impairment, the vocational factors of age, education, and work experience. *Ibid.*

Since the enactment of the disability program in the 1950's Congress, and in particular the congressional committees with oversight responsibility for the social security programs, have sought promulgation of regulations making more specific the criteria to be used for disability determinations. See *Kirk* v. *Secretary of Health and Human Services*, 667 F.2d 524, 527 (6th Cir. 1981); *Santise* v. *Schweiker*,

Nos. 81-1904 *et al.* (3d Cir. Apr. 8, 1982), slip op. 24-25 n.24. Before adopting the regulations at issue here, the Social Security Administration over a period of years had developed administrative materials to be used by state agencies in making initial and reconsideration determinations on disability. See 43 Fed. Reg. 55349, 55350-55351 (1978).[1] These materials were not published as regulations and were not binding on or generally available to administrative law judges or the federal courts.

In 1978, after years of study and consultation with Congress, and after giving interested parties an opportunity for comment, the Secretary promulgated regulations designed to implement the disability provisions of the Act. 43 Fed. Reg. 9284 (1978). These medical-vocational regulations, which became effective on February 26, 1979 (*id.* at 55349),[2] govern the decisional sequence for disability claims.[3] Before the

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[1] There are four levels of administrative consideration for disability claims. The first two—the initial and reconsideration determinations—are made for the Social Security Administration by state agencies. 42 U.S.C. 421(a). The third level is a hearing before an administrative law judge in the Social Security Administration. 42 U.S.C. 405(b). The fourth level is review by the Appeals Council of the Social Security Administration. Judicial review of the final administrative decision is authorized by 42 U.S.C. 405(g). See *Califano* v. *Sanders*, 430 U.S. 99, 101-102 (1977).

[2] The agency later rewrote the regulations to make them clearer and easier to use. 45 Fed. Reg. 55566 (1980).

[3] The Act's definition of disability is the same for both the Federal Old-Age, Survivors, and Disability Insurance program (Title II) and the Supplemental Security Income ("SSI") program (Title XVI). Compare Section 223(d) of Title II, 42 U.S.C. 423(d), with Section 1614(a)(3) of Title XVI, 42

guidelines may be consulted, the claimant must demonstrate that he is not currently working. If he is, the claim will be denied. 20 C.F.R. 404.1520(b). Second, the claimant must show, on the basis of medical evidence alone, that his impairment is "severe," *i.e.*, that it "significantly limits [his] physical or mental ability to do basic work activities." If it does not, the claim again will be denied. 20 C.F.R. 404.1520(c). Third, if the impairment is as severe as those listed in Appendix 1 of the regulations, 20 C.F.R. Part 404, Subpart P, the claimant will receive benefits without regard to his vocational characteristics. 20 C.F.R. 404.1520(d). Fourth, if the impairment is less severe than those listed in Appendix 1, the claimant must show that, because of his impairment, he can no longer perform work he has done in the past. If he can still do such work, his claim will be denied. 20 C.F.R. 404.1520(e). If he cannot do such work, there must be further factual determinations about each of the variables made relevant by the Act and the regulations: the claimant's "residual functional capacity" (*i.e.*, the level of work he can perform, based upon medical evidence, despite his impairment), age, education, and prior work experience. 42 U.S.C. 423(d)(2)(A); 20 C.F.R. 404.1545, 404.1560 to 404.1568. With regard to each of these factors, the claimant may introduce evidence and rebut the case made by the Secretary. 20 C.F.R. Part 404, Subpart P, Appendix 2, Section 200.00(a).

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U.S.C. 1382c(a)(3). The medical-vocational regulations apply to disability determinations under both programs; 20 C.F.R. Part 404, Subpart P, governs Title II claims; 20 C.F.R. Part 416, Subpart I, which is virtually identical to Subpart P, applies to SSI claims. Respondent claimed benefits only under Title II.

It is only after this detailed inquiry into a claimant's medical and vocational characteristics that the guidelines come into play. The tables set out in Appendix 2 of the regulations are consulted to determine one question: whether there exist jobs in the national economy that can be performed by a person of the claimant's residual functional capacity, age, education, and prior work experience. The tables do not purport to answer that question for all claimants who have reached the last stage in the decisional sequence. For example, the tables consider only a claimant's strength in their division according to "residual functional capacity." Thus, for one whose impairment results from mental or sensory limitations, a more individualized determination of available work must be made. 20 C.F.R. Part 404, Subpart P, Appendix 2, Section 200.00(e).

For those cases in which use of the tables is appropriate, the Secretary has taken administrative notice of jobs that are available in the national economy. For example, underlying the table for sedentary work—the most restricted category encompassed by the tables—are approximately 200 unskilled occupations, each representing numerous jobs, that can be performed by claimants with the exertional capacity for a full range of sedentary work. 20 C.F.R. Part 404, Subpart P, Appendix 2, Section 201.00(a). See also Sections 202.00(a) (1600 occupations for those able to do light work); 203.00(a) (2500 occupations for those able to do medium work). The weight given to the combinations of age, education, and work experience in each table is based on further administrative notice of the significance of those factors for the claimant's ability to adapt to new work situations. 43 Fed. Reg. 55353-55355 (1978). The sources of data on the numbers of unskilled jobs and the voca-

tional significance of age, education, and work experience are set forth in the preamble to the regulations, 43 Fed. Reg. 55352-55355 (1978), and in the text of the regulations, 20 C.F.R. 404.1566(d) (job data); Appendix 2, Section 200.00(b) (job data).[4] The regulations are accompanied by a detailed textual statement that explains and justifies each of the medical-vocational rules (App. F, *infra*, 52a-75a).

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[4] For example, the determinations about unskilled jobs at various levels are "supported by the 'Dictionary of Occupational Titles' and the 'Occupational Outlook Handbook,' published by the Department of Labor; the 'County Business Patterns' and 'Census Surveys' published by the Bureau of the Census; and occupational surveys of light and sedentary jobs prepared for the Social Security Administration by various State employment agencies." 20 C.F.R. Part 404, Subpart P, Appendix 2, Section 200.00(b).

Similar sources bolster the Secretary's recognition of the effect that the several vocational characteristics have on the ability to adapt to work other than past work. Concerning the effect of education the regulations rely, in addition to the sources listed above and to statistics compiled by the Department, on such materials as "*The Long Term Unemployed, Educational Attainment* (October 1964) published by the Manpower Administration of the Department of Labor in cooperation with the Oklahoma Employment Security Commissioner (pages vi and 18); *Monthly Labor Review* of January 1974, an article entitled 'Educational Attainment of Workers, March 1973' (pages 58-81); Automation Manpower Services Program Report by the New Jersey State Employment Service entitled *'The "Mack" Worker, The Impact of His Job Loss 2½ Years Later'* (December 1965) (pages 14 and 15); *A Survey of the Employment of Older Workers* (1965) by the State of California Department of Employment and Citizens' Advisory Committee on Aging; *The Impact of Technological Change in the Meatpacking Industry*, published by the Division of Employment, Department of Labor, in March 1966 (page 16)." 43 Fed. Reg. 55354 (1978).

This method of determining whether "substantial gainful work * * * exists in the national economy," 42 U.S.C. 423(d)(2)(A), is essentially nothing more than a perfection of the procedure that was employed before the guidelines were adopted. In most pre-regulation cases that issue was determined through the use of testimony by vocational experts knowledgeable about the existence and requirements of jobs in the national economy. See *Hephner* v. *Mathews*, 574 F.2d 359, 362-363 (6th Cir. 1978).[5] Such experts would rely, as a basis for their information, on the kinds of sources that are the foundation for the guidelines in Appendix 2. The tables simply afford the added benefit of the knowledge the agency has gathered in more than two decades of administering the disability provisions of the Act, and most importantly, assure consistent determinations across the multitude of cases.

2. Respondent filed a claim for disability benefits in October 1979, alleging disability due to a back problem and high blood pressure (App. A, *infra*, 2a). Her claim was denied initially, and upon reconsideration (*ibid.*). On September 26, 1980, an administrative law judge concluded after a hearing that respondent was not disabled. He found that while respondent was unable to perform her past work, she retained the residual functional capacity for light work (App. D, *infra*, 22a-27a). The ALJ found that respondent was then 52 years old, "closely approaching ad-

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[5] The Secretary was, however, permitted to base a determination of nondisability on administrative notice where it was established that a claimant could do a full range of work at some particular exertional level and that his vocational characteristics were not particularly adverse. See, *e.g.*, *Parker* v. *Harris*, 626 F.2d 225, 233 (2d Cir. 1980); *White* v. *Harris*, 605 F.2d 867, 868-869 (5th Cir. 1979).

vanced age," had a marginal education but was able to communicate in English, and had unskilled work experience (*id.* at 28a-29a). On the basis of these findings, the ALJ applied Rule 202.10 in Table 2 of Appendix 2, which directed a conclusion that respondent was not disabled (see App. F, *infra*, 69a). The decision of nondisability in respondent's case was based on administrative notice that there are some 1,600 unskilled occupations that can be performed by persons with the exertional capacity for a full range of light work, and on administrative notice of expert sources on the vocational significance of respondent's age, education, and work experience (*id.* at 65a-67a).

In December 1980, the Social Security Administration Appeals Council adopted the decision of the administrative law judge (App. C, *infra*, 16a-19a). Respondent then sought judicial review in the United States District Court for the Eastern District of New York. On April 29, 1981, the district court concluded that there was substantial evidence to support the Secretary's decision and dismissed the complaint (App. B, *infra*, 15a).

3. The court of appeals remanded to the Secretary for further evidentiary proceedings (App. A, *infra*, 1a-11a). The court agreed that there was substantial evidence in the administrative record to support the finding that respondent had the residual functional capacity to perform a wide range of light work (*id.* at 7a). It also did not dispute the appropriate classification of respondent's age, education, and work experience. The court nevertheless held that the Secretary, in determining whether there was "work * * * in the national economy" (see 42 U.S.C. 423(d)(2)(A)) that respondent could perform, was not entitled to take administrative notice of the jobs

on which the tables in Appendix 2 are predicated. Rather, the court held, the Secretary must " 'identify specific alternative occupations available in the national economy that would be suitable for the claimant' " and give for each " ' "a job description clarifying the nature of the job, [and] demonstrating that the job does not require" exertion or skills not possessed by the claimant.' " (App. A, *infra*, 9a, quoting *Decker* v. *Harris*, 647 F.2d 291, 298 (2d Cir. 1981)). Without such specificity, the court believed, "the claimant is deprived of any real chance to present evidence showing that she cannot in fact perform the types of jobs that are administratively noticed by the guidelines" (App. A, *infra*, 10a).[6]

## REASONS FOR GRANTING THE PETITION

This case involves a question of substantial importance for the operation of the Social Security Administration's disability programs. The medical-vocational regulations set forth criteria intended to ensure rationality and consistency in the adjudication of hundreds of thousands of claims for disability benefits each year. By invalidating these regulations

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[6] The court did not explain why notice of specific occupational possibilities should be required if the guidelines, which render superfluous a hearing on that question, are valid. It can only be presumed that the court found the guidelines in some way to have exceeded the Secretary's authority to enforce the Act by promulgating regulations. But see 42 U.S.C. 405(a). In any event, the effect of the court's decision is to preclude the use of the textual and tabular guidelines in 20 C.F.R. Part 404, Subpart P, Appendix 2, in all stages of the disability decisionmaking process. And since the regulations in Subpart P, 404.1501 to 404.1598, are in many ways keyed to the ultimate determination made in Appendix 2, they too are pro tanto invalid. This is particularly true of 20 C.F.R. 404.1560 to 404.1569.

and instead requiring individualized proof in each case about the existence of jobs open to the claimant in the national economy, the court of appeals has required the replication on an enormous scale of a task already adequately performed at the rulemaking stage. This decision ignores the Secretary's broad statutory authority to adopt rules and regulations "necessary or appropriate to carry out" the provisions of the Act (42 U.S.C. 405(a)) and conflicts with the decision of every other court of appeals that has considered the issue. Review by this Court is plainly warranted.

1. The disability hearing system managed by the Department of Health and Human Services pursuant to the Social Security Act is "probably the largest adjudicative agency in the western world." *Santise* v. *Schweiker*, *supra*, slip op. 12, quoting J. Mashaw et al., *Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System* xi (1978). Approximately 2.4 million claims for Title II disability insurance benefits and Title XVI disability benefits were filed by workers in fiscal year 1980. Department of Health and Human Services, *Social Security Annual Report to the Congress for Fiscal Year 1980*, at 23, 25 (1981). More than a quarter of a million claimants in fiscal year 1980 pursued their claims to the point of requesting a hearing before an administrative law judge. *Id.* at 28. In turn, nearly 8000 claimants found not disabled by the Secretary filed suit in federal court seeking review of the adverse administrative decision. *Id.* at 30. With respect to a large number of those claims, the ultimate question was whether the claimant, considering his impairment, age, education, and work experience, should be considered disabled because he could not perform "substantial gainful work

which exists in the national economy." 42 U.S.C. 423(d)(2)(A). The decision in this case renders useless the guidelines for making that determination which the Secretary adopted in 1979, after long and elaborate preparation.[7]

2.a. The Social Security Act does not compel these unpalatable consequences. The court of appeals' decision in this case ignores the broad statutory grant of authority to the Secretary to adopt the guidelines in Appendix 2. Section 205(a) of the Act, 42 U.S.C. 405(a), states:

> The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits [under Title II].

See also 42 U.S.C. 423(d)(5). This Court has recently reaffirmed that regulations adopted by the Secretary pursuant to an express delegation of substantive authority are entitled to "legislative effect" and must be upheld unless they are arbitrary or

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[7] The requirement that the Secretary prove the availability of work through the testimony of vocational experts or similar means would entail particular hardships for the disability hearing system in the Second Circuit, because that court has imposed limits on the time within which hearings must be held and determinations made in Title II and Title XVI cases. *Sharpe* v. *Harris*, 621 F.2d 530 (2d Cir. 1980); *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978); *White* v. *Mathews*, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978).

capricious. *Schweiker* v. *Gray Panthers*, No. 80-756 (June 25, 1981), slip op. 9; see also *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977).

The medical-vocational regulations plainly satisfy that test. They require a specific, individualized factual determination of each one of the particular characteristics that the Act makes relevant to a claimant's ability to engage in substantial gainful work: the nature of his impairment and his residual functional capacity, his age, his education, and his prior work experience. The only issue on which the regulations do not require individualized proof in every case is the nature of the job market itself. That is a matter that is more apt for decision by rulemaking rather than by adjudication—whether jobs exist in the national economy for those classes of people whose medical and vocational characteristics match one of the descriptions in the tables. Such a set of rules unquestionably regulates "the nature and extent of the proofs and evidence" in disability cases, and is both "necessary [and] appropriate to carry out [the disability] provisions." See *Cummins* v. *Schweiker*, 670 F.2d 81, 83 (7th Cir. 1982); *Kirk* v. *Secretary of Health and Human Services*, *supra*, 667 F.2d at 530.

Part of the impetus behind promulgation of the regulations and the accompanying guidelines was the widely recognized tendency of the disability process to reach inconsistent results in similar cases. *Santise* v. *Schweiker*, *supra*, slip op. 12-14. In 1976, for example, the Comptroller General reported that a study of ten state agencies showed complete agreement on the proper disposition of only 22% of a test group of disability claims. Comptroller General of the United States, *The Social Security Administration Should Provide More Management and Leadership In Determining Who Is Eligible For Disability*

*Benefits* 6-10 (1976). The apparent arbitrariness of such an adjudicatory system resulted in part from the occasional failure to consider all the vocational factors Congress considered relevant, in part from the assignment of inconsistent weight to those factors, and in part from the necessarily ad hoc judgments made by agencies and administrative law judges, "based on the testimony of vocational experts * * * and on their own limited and variable knowledge of the labor market," about what kinds of jobs exist. *Cummins* v. *Schweiker*, *supra*, 670 F.2d at 83. The medical-vocational regulations and the guidelines in Appendix 2 respond to those concerns by focusing the attention of the factfinder on all of the relevant vocational criteria, by considering the weight those factors are given in the labor market, and by taking administrative notice—after thorough investigation and the opportunity for public comment—of the occupations available in the national economy. The result is that "the claims of all individuals similarly situated are handled in a fair and consistent manner" and that "determinations made by one set of adjudicators on the basis of the same facts will be handled the same way by another group of adjudicators, wherever in the country they are located." 43 Fed. Reg. 55362 (1978).

b. The court of appeals stated its opposition to the medical-vocational regulations in these terms (App. A, *infra*, 10a):

> [O]ur major concern is that the claimant be given adequate notice of the nature and demands of the types of jobs allegedly available. Absent sufficient notice, the claimant is deprived of any real chance to present evidence showing that she cannot in fact perform the types of jobs that are administratively noticed by the guidelines.

The court's perception was quite accurate: the very purpose of the guidelines is to make a conclusive determination "of the availability of jobs * * * for claimants whose abilities are accurately described by the grid." *Kirk* v. *Secretary of Health and Human Services*, *supra*, 667 F 2d at 531. But the court offered no reason why the achievement of that purpose should render the guidelines invalid.

It is important, in the first place, to make clear the limited nature of the determination embodied in the tables. They are consulted only after the decisionmaker has considered, and the claimant has had a chance to rebut, *all* relevant evidence bearing on the claimant's physical and mental impairments, prior work experience, education, and age, and only after it has been determined that the claimant's medical and vocational characteristics are accurately described by some category in the tables. The regulations specifically dictate that "a conclusion of disabled or not disabled is not directed" if a claimant's vocational profile is not precisely contained in Appendix 2. 20 C.F.R. 404.1569 and Appendix 2, Section 200.00(d). For example, if the claimant has an impairment unrelated to physical strength, the tables cannot be used to deny benefits. 20 C.F.R. Part 404, Subpart P, Appendix 2, Section 200.00(e). Similarly, if his impairment is exertional, but falls between the ranges indicated in the tables, the rules only offer guidance, not a fixed result. Section 200.00(e).[8] Moreover, the

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[8] Appendix 2, Section 201.00(h) gives the following example:

> Example 1: An individual under age 45 with a high school education can no longer do past work and is restricted to unskilled sedentary jobs because of a severe medically determinable cardiovascular impairment (which does not meet or equal the listings in Appendix 1). A

regulations expressly state that age categories will not be applied "mechanically in a borderline situation." 20 C.F.R. 404.1563(a).

It is also important to emphasize that a claimant *does* have explicit notice of the relevant requirements for performing all the unskilled jobs of which the tables in Appendix 2 take administrative cognizance. For example, the unskilled jobs involving light work (Table 2)—the category of work the court of appeals acknowledged respondent could perform—are described in the regulations as follows:

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. 404.1567(b).

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permanent injury of the right hand limits the individual to sedentary jobs which do not require bilateral manual dexterity. None of the rules in Appendix 2 are applicable to this particular set of facts, because this individual cannot perform the full range of work defined as sedentary. Since the inability to perform jobs requiring bilateral manual dexterity significantly compromises the only range of work for which the individual is otherwise qualified (i.e., sedentary), a finding of disabled would be appropriate.

Those individuals whose abilities are accurately described in the tables, however, may not require the Secretary to repeat in each case the process that resulted in promulgation of the regulations. Here, for example, the Secretary found that respondent had the "residual functional capacity" to perform "light work," and the court of appeals upheld that finding as supported by the record (App. A, *infra*, 7a). An additional requirement that respondent be notified about, and be given an opportunity to rebut, the approximately 1600 specific types of unskilled "light work" existing in the national economy would be superfluous. The existence of such jobs has already been determined after careful study and after public notice and comment, based on the same data that "a vocational expert would consult in determining whether a particular claimant's abilities matches [*sic*] a job's requirements." *Kirk* v. *Secretary of Health and Human Services*, *supra*, 667 F.2d at 530. Nothing in the Act precludes the Secretary from determining those issues by a general rule, rather than by case-by-case adjudication.[9] See *Schweiker* v. *Gray Panthers*, *supra*, slip op. 13. As the Seventh Circuit recently remarked (*Cummins* v. *Schweiker*, *supra*, 670 F.2d at 83):

> If the statutory term "disability" described a historical fact best or only ascertainable on a case-by-case basis, binding criteria might be a problem; but it does not; it is a judgment that a person's health makes it exceedingly unlikely that he could find a job even if he looked hard

[9] The court below did not suggest that the general rule applicable to respondent's case is unreasonable or unsupported by the occupational data consulted during the administrative process.

> for one everywhere in the United States. Such a judgment, to be well informed, requires a broad knowledge of the labor market. The Department of Health and Human Services has this knowledge and can both supplement and draw upon it in a rulemaking proceeding. It was entitled to substitute an institutional judgment for the *ad hoc* judgments of administrative law judges based on the testimony of vocational experts and other witnesses and on their own limited and variable knowledge of the labor market.

3. The Second Circuit's decision in this case conflicts with decisions of the First, Third, Fourth, Fifth, Sixth, and Seventh Circuits upholding use of the guidelines in Appendix 2 to determine disability. In *Santise* v. *Schweiker*, *supra*, slip op. 29-30 (emphasis in original; citation & footnote omitted), the Third Circuit rejected the precise argument relied on by the Second Circuit in this case:

> As for the "requirement" * * * that the Secretary identify *specific* jobs capable of being performed by a disability claimant, we stress that the Social Security Act, by its terms, does not place such an obligation upon the Department. Rather, this "judicially imposed standard [was] designed to ensure that each claimant's own particular characteristics . . . are given full consideration" by an ALJ and a reviewing court. And we are persuaded that this same objective can be realized if administrative notice is substituted for statements that would have been made by vocational experts. * * * [I]t would appear sufficient, for purposes of the substantial evidence test, for the Secretary to demonstrate, to the satisfaction of a reviewing court, that there exist *many* jobs capable of being filled by an individual with the claimant's characteristics.

In *Kirk* v. *Secretary of Health and Human Services*, *supra*, 667 F.2d at 530 (emphasis in original), the Sixth Circuit reached precisely the same conclusion:

> The grid *has* displaced the Secretary's burden of demonstrating which particular jobs the claimant can perform. But, that does not render the regulations invalid. The grid itself takes into account the same sources which a vocational expert would consult in determining whether a particular claimant's abilities matches [*sic*] a job's requirements, yet provides greater uniformity with fewer administrative costs.

To the same effect are cases in the First, Fourth, Fifth and Seventh Circuits. *Rodriguez* v. *Secretary of Health and Human Services*, No. 81-1610 (1st Cir. Apr. 2, 1982); see *Geoffroy* v. *Secretary of Health and Human Services*, 663 F.2d 315, 318-319 (1st Cir. 1981); *Frady* v. *Harris*, 646 F.2d 143, 144-145 (4th Cir. 1981);[10] *Salinas* v. *Schweiker*, 662 F.2d 345, 347-349 (5th Cir. 1981); *Cummins* v. *Schweiker*, *supra*, 670 F.2d at 83.

The issue is also under consideration in every other court of appeals except the District of Columbia Circuit. *McCoy* v. *Schweiker*, appeal pending, Nos. 81-1629 et al. (8th Cir.) (en banc); *Stone* v. *Schweiker*, appeal pending, No. 82-3017 (9th Cir.); *Blanchette* v. *Schweiker*, appeal pending, No. 81-2468 (10th

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[10] In *Frady*, the Fourth Circuit upheld the use of the tables. In *Hall* v. *Harris*, 658 F.2d 260, 267-268 (4th Cir. 1981), another panel of the Fourth Circuit questioned their validity in dictum. In *Epsilantis* v. *Schweiker*, No. 80-1600 (Apr. 13, 1982), the court appointed counsel for a pro se claimant, heard initial argument en banc to resolve the tension between *Frady* and *Hall*, and upheld the rule in *Frady* by an equally divided court.

Cir.);[11] *Broz* v. *Schweiker*, appeal pending, Nos. 81-7140 & 81-9558 et al. (11th Cir.).[12] Numerous other cases raising the same question have been stayed in various circuits pending decision of the lead cases cited above.

The Second Circuit's ruling is thus out of step with the holdings of at least six other courts of appeals on an issue of substantial practical importance. Regardless of the outcome of pending appeals, the conflict among the circuits will continue to exist, and the Secretary will be precluded from utilizing the medical-vocational regulations, on a nationwide basis, if the result is to deny disability benefits. This Court should resolve the conflict.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
*Solicitor General*
J. PAUL MCGRATH
*Assistant Attorney General*
KENNETH S. GELLER
*Deputy Solicitor General*
JOHN H. GARVEY
*Assistant to the Solicitor General*
ROBERT S. GREENSPAN
ANNE BUXTON SOBOL
*Attorneys*

APRIL 1982

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[11] The Tenth Circuit has already signalled its approval of the tables in dictum. See *Hilton* v. *Schweiker*, No. 81-1139 (10th Cir. Feb. 26, 1982), slip op. 9-10; *Chapman* v. *Schweiker*, No. 81-1025 (10th Cir. Feb. 26, 1982), slip op. 9.

[12] The Eleventh Circuit, in contrast to the Tenth, has in dictum expressed "serious doubts" about determinations based solely on the tables in Appendix 2. See *Cowart* v. *Schweiker*, 662 F.2d 731, 736 n.1 (11th Cir. 1981).

# Appendix

**APPENDIX A**

# UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 154—August Term 1981

(Argued September 28, 1981
Decided November 30, 1981)

Docket No. 81-6108

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CARMEN CAMPBELL, PLAINTIFF-APPELLANT

*v.*

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE

---

Filed Nov. 30, 1981

Before:

LUMBARD and VAN GRAAFEILAND, Circuit Judges, and BONSAL, District Judge *

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* Of the United States District Court for the Southern District on New York, sitting by designation.

BONSAL, District Judge:

Carmen Campbell appeals from a final judgment of the United States District Court for the Eastern District of New York (Costantino, J.), entered on April 30, 1981. The District Court granted the motion of the Secretary of the Department of Health and Human Services ("Secretary") for judgment on the pleadings and affirmed the Secretary's denial of insurance benefits to Ms. Campbell. We find that the record on which the Secretary's decision rests is inadequate in certain critical respects and accordingly we remand for further proceedings.

## BACKGROUND

On October 15, 1979 Carmen Campbell filed an application for disability insurance benefits with the Social Security Administration claiming total disability due to a back condition caused by a herniated disc and due to hypertension. On December 10, 1979 her application was denied. Ms. Campbell requested reconsideration which was again denied by notice dated March 21, 1980. On May 20, 1980 Ms. Campbell requested a *de novo* review of her application and on August 22, 1980 a hearing was held before an Administrative Law Judge ("ALJ") at which Ms. Campbell appeared *pro se*. In a decision dated September 26, 1980 the ALJ found that Ms. Campbell retained the capacity to do "light work" and that she was therefore "not disabled" within the meaning of the Social Security Act.

On October 31, 1980 Ms. Campbell sought review of the ALJ's decision by the Appeals Council. She

submitted new medical evidence—a report by her treating physician, Dr. Lowenthal, which she asserted warranted a finding of disability by the Appeals Council. The Appeals Council made the report part of the record and denied her request for review.

On January 19, 1981 Ms. Campbell filed a *pro se* complaint seeking review of denial of benefits in the United States District Court for the Eastern District of New York (42 U.S.C. § 405(g)).

A hearing before the District Court was held on April 20, 1981 at which Ms. Campbell was represented by counsel. The district judge stated at the hearing that he had reviewed the record and suggested that in his opinion the Secretary's decision was supported by substantial evidence. The Secretary then moved for summary judgment and by Order dated April 23, 1981 Ms. Campbell's complaint was dismissed, from which Order she appeals.

## FACTS

Ms. Campbell, aged 51 at the time she filed her application, was born in Panama where she completed a sixth grade education. Spanish is her first language but she has a "fair" knowledge of English. Ms. Campbell was employed as a hotel maid. Her duties included making beds, dusting, vacuuming and pushing "trucks" which carried her equipment. Between 1971 and 1973 she also worked as a seamstress in the hotel, and in 1973 she injured her back while moving a large laundry truck. In 1975 her doctor informed her that she had a slipped disc. However, she continued working until December of 1978. In January of 1979 Ms. Campbell underwent a lamin-

ectomy to remove a herniated disc. She was discharged within two weeks.

The ALJ considered the medical and hospital records and the reports of Drs. Khatib and Lowenthal. Dr. Khatib diagnosed Ms. Campbell's herniated disc, performed the operation and saw her during several follow-up visits. In May of 1979 Dr. Khatib reported that she could return to work in June so long as she did not lift heavy objects or do "strenuous work." (App. at 98).[1] In July Dr. Khatib reported that she could return to "light duty work" and in November of 1980 reported that she "is disabled from doing her regular work and should avoid lifting heavy objects and strenuous work." (App. at 99, 127).

Ms. Campbell saw Dr. Lowenthal at the request of the State of New York Workers' Compensation Board from February of 1980 through the spring and summer. In August of 1980 Dr. Lowenthal filled out a questionnaire stating that she could continuously stand for 30 minutes, sit for 30 minutes, and alternatively stand or sit at one time for one hour; that due to severe pain she must lie down during the day and that she could lift or carry weights of "up to ten pounds." (App. at 113-115).

The ALJ considered Ms. Campbell's age, education, past work experience and the medical evidence. He found that Ms. Campbell was no longer able to work as a hotel maid but that she could do "light work." He concluded that since she could do "light

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[1] This abbreviation refers to "Appellant's Appendix, Administrative Proceedings Below" which was submitted to this court as part of the record on appeal.

work," Ms. Campbell was not under a "disability" as defined by the Act. (42 U.S.C. § 423(d)(1)).

## DISCUSSION

Section 423(d)(1)(A) provides that the term "disability" means:

> "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; . . . ."
>
> 42 U.S.C. § 423(d)(1)(A) (1974).

For the purposes of Section 423(d)(1)(A), the individual must be

> ". . . not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether he would be hired if he applied for work . . . ."
>
> 42 U.S.C. § 423(d)(2)(A) (1974).

The initial burden of proving that a disability exists rests upon the claimant. 42 U.S.C. § 423(d)(5)(1977); *Parker* v. *Harris*, 626 F.2d 225, 231 (2d Cir. 1980). In this case there is no dispute that this burden was met because the ALJ made a specific

finding that Ms. Campbell's condition prevented her return to her past work.

Thereupon,

> ". . . the burden shifts to the Secretary, who must produce evidence to show the existence of alternative substantial gainful work which exists in the national economy and which the claimant could perform, considering not only his physical capability, but as well his age, his education, his experience and his training." *Parker* v. *Harris*, 626 F.2d at 231 (citations omitted).

Here the Secretary must show:

> "First, . . . that the claimant's impairment is of a kind that still permits certain types of activity, such as lifting or walking, necessary for other occupations, and that the claimant's experience involves skills transferable to other work. Second, the Secretary must present evidence showing the existence of specific types of jobs, available in the national economy, suitable for a claimant with these capabilities and skills. *See, e.g., Bastien* v. *Califano*, 572 F.2d 908, 912-13 (2d Cir. 1978)." *Decker* v. *Harris*, 647 F.2d 291, 294 (2d Cir. 1981).

In order to promote a more efficient analysis of relevant factors and to promote consistency in decisions by the Secretary in the adjudication of disability claims, the Social Security Administration adopted new regulations which became effective on February 26, 1979. 20 C.F.R. §§ 404.1501-.1598.

Under the new regulations, once it is determined that the claimant cannot perform her past work, the Secretary must show what the claimant's "residual functional capacity" is. Here the ALJ found that Ms. Campbell was capable of performing "light work." "Light work" is defined by the regulations as follows:

> "(b) *Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities." *Id.* § 404.1567.

The record as a whole supports the ALJ's finding that Ms. Campbell had the "residual functional capacity" to perform "light work."

Having determined that Ms. Campbell had the capacity to perform "light work," the regulations require the Secretary to show the availability of jobs in the national economy "suitable for a claimant with these capabilities and skills." *Decker* v. *Harris*, 647 F.2d at 294. To assist the Secretary in making this showing, the "medical-vocational guidelines" were adopted. *See* 20 C.F.R. Subpart P, Appendix 2. In Ms. Campbell's case, the ALJ relied on rule 202.10 of the guidelines which provides that a person who is "closely approaching advanced age," with a limited education, and whose prior work experience is un-

skilled is "not disabled."[2] The Secretary contends that the ALJ is not required to identify specific jobs because their existence has already been administratively noticed through the adoption of the guidelines.[3]

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TABLE NO. 2—RESIDUAL FUNCTIONAL CAPACITY: MAXIMUM SUSTAINED WORK CAPABILITY LIMITED TO LIGHT WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)

| Rule | Age | Education | Previous work experience | Decision |
|---|---|---|---|---|
| 202.01 | Advanced age | Limited or less | Unskilled or none | Disabled. |
| 202.02 | do | do | Skilled or semiskilled—skills not transferable. | Do. |
| 202.03 | do | do | Skilled or semiskilled—skills transferable [1]. | Not disabled. |
| 202.04 | do | High school graduate or more—does not provide for direct entry into skilled work [2]. | Unskilled or none | Disabled. |
| 202.05 | Advanced age | High school graduate or more—provides for direct entry into skilled work [2] | Unskilled or none | Not disabled. |
| 202.06 | do | High school graduate or more—does not provide for direct entry into skilled work [2] | Skilled or semiskilled—skills not transferable. | Disabled. |
| 202.07 | do | do | Skilled or semiskilled—skills transferable [1]. | Not disabled. |
| 202.08 | do | High school graduate or more—provides for direct entry into skilled work [2]. | Skilled or semiskilled—skills not transferable. | Do. |
| 202.09 | Closely approaching advanced age. | Illiterate or unable to communicate in English. | Unskilled or none | Disabled. |
| 202.10 | do | Limited or less—At least literate and able to communicate in English. | do | Not disabled. |
| 202.11 | do | Limited or less | Skilled or semiskilled—skills not transferable. | Do. |
| 202.12 | do | do | Skilled or semiskilled—skills transferable. | Do. |
| 202.13 | do | High school graduate or more. | Unskilled or none | Do. |
| 202.14 | do | do | Skilled or semiskilled—skills not transferable. | Do. |
| 202.15 | do | do | Skilled or semiskilled—skills transferable. | Do. |
| 202.16 | Younger individual | Illiterate or unable to communicate in English. | Unskilled or none | Do. |
| 202.17 | do | Limited or less—At least literate and able to communicate in English. | do | Do. |
| 202.18 | do | Limited or less | Skilled or semiskilled—skills not transferable. | Do. |
| 202.19 | do | do | Skilled or semiskilled—skills transferable. | Do. |
| 202.20 | do | High school graduate or more. | Unskilled or none | Do. |
| 202.21 | do | do | Skilled or semiskilled—skills not transferable. | Do. |
| 202.22 | do | do | Skilled or semiskilled—skills transferable. | Do. |

[1] See 202.09(f).
[2] See 202.00(c).

[3] As the introduction to the guidelines explains:

"(b) the existence of jobs in the national economy is reflected in the "Decisions" shown in the rules; i.e., in promulgating the rules, administrative notice has been taken of the numbers of unskilled jobs that exist throughout the national economy at the various functional levels

Before and after the adoption of the guidelines this circuit has consistently required that "the Secretary identify specific alternative occupations available in the national economy that would be suitable for the claimant" and that "these jobs be supported by 'a job description clarifying the nature of the job, [and] demonstrating that the job does not require' exertion or skills not possessed by the claimant. *Bastien* v. *Califano*, supra, 572 F.2d at 912-13." *Decker* v. *Harris*, 647 F.2d at 298. *See also Parker* v. *Harris*, 626 F.2d at 233-34. In the past, this has been done largely through the use of vocational testimony to establish that there are specific jobs suitable to the claimant's capabilities.

The central issue in this case is whether the guidelines provide adequate evidence of a claimant's ability to perform a specific alternative occupation. This circuit recently examined the conflict between the guidelines and prior case law in *Decker* v. *Harris*, *supra*. While the court did not have to resolve the conflict in that case because the issue was not "squarely presented" on the facts, the court did reaffirm the need for a specific showing of suitable alternative jobs. The court said:

> "We believe that the essential concern . . . is that if the Secretary chooses to proceed without

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(sedentary, light, medium, heavy and very heavy) as supported by the 'Dictionary of Occupational Titles' and the 'Occupational Outlook Handbook', published by the Department of Labor; the 'County Business Patterns' and 'Census Surveys' published by the Bureau of Census; and occupational surveys of light and sedentary jobs prepared for the Social Security Administration by various State employment agencies." 20 C.F.R., Subchapter P, Appendix 2, § 200.00(b).

> expert testimony by taking administrative notice, the Secretary must provide a similar degree of specificity to achieve the underlying objectives of procedural fairness to the claimant and preservation of an adequate record for review. The key consideration in the administrative proceeding must be that the claimant be given adequate opportunity to challenge the suitability or availability of the jobs noticed." *Id.* at 298.

Now that the issue is "squarely presented," our major concern is that the claimant be given adequate notice of the nature and demands of the types of jobs allegedly available. Absent sufficient notice, the claimant is deprived of any real chance to present evidence showing that she cannot in fact perform the types of jobs that are administratively noticed by the guidelines. This is particularly true in Ms. Campbell's case where the ALJ gave no indication of any specific "light work" jobs that she was capable of performing but relied on the guidelines which take notice of approximately 1,600 types of "light work" jobs available in the national economy. 20 C.F.R. Subpart P, Appendix 2, § 202.00. If there are so many types of jobs available, it would not be too great a burden for the Secretary or the ALJ to specify a few suitable alternative available types of jobs so that a claimant is given an opportunity to show that she is incapable of performing those jobs. Moreover, we stress that the jobs should be specified at the hearing so that the claimant has a chance to put evidence into the record on that issue. In Ms. Campbell's case she was not informed of the Secretary's position and the ALJ's findings until she received his decision, when it was too late for her to

rebut any finding of available "light work" jobs. In failing to show suitable available alternative jobs for Ms. Campbell, the Secretary's finding of "not disabled" is not supported by substantial evidence.

Accordingly, we remand this case to the Secretary for further proceedings consistent with this opinion, including a listing of particular types of jobs suitable to the capabilities of Ms. Campbell.

APPENDIX B

# UNITED STATES DISTRICT COURT
# EASTERN DISTRICT OF NEW YORK

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CV-81-155

CARMEN CAMPBELL, PLAINTIFF

*—against—*

SECRETARY, HEALTH AND HUMAN SERVICES, DEFENDANT

Filed Jul. 28, 1981

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## MEMORANDUM OF DECISION AND ORDER

July 27, 1981

COSTANTINO, D.J.

As set forth in the court's prior order, the court after reviewing the record on appeal concludes that the determination of the Secretary is supported by substantial evidence. 42 U.S.C. § 405(g). What follows is the court's rationale behind this decision.

Plaintiff, Carmen Campbell ("Campbell"), a 53-year old female, seeks disability benefits and claims that she suffers from a herniated disc and hypertension. According to the testimony at the hearing before the Administrative Law Judge ("ALJ") and

the evidence presented at that hearing, Campbell was injured while working as a hotel maid in 1973, and continued to work with the injury until January of 1979 when she had a laminectomy to remove a herniated disc. She alleges, however, that since the operation, she has suffered continuous pain in her lower back which she maintains is disabling. There is no evidence in the record regarding the hypertension claim.

In a decision dated September 26, 1980, the ALJ found that Campbell's injuries do affect her ability to perform many work-related functions, but they were not so severe as to meet those impairments set forth in the Secretary's "Listings". In finding that plaintiff was still able to perform light work, the ALJ concluded that Campbell was not under a "disability" as defined by the Social Security Act.

In support of her claim, plaintiff submitted several medical reports by Dr. Reza Khatib, the treating physician, and by Dr. Milton Lowenthal. The ALJ rejected the conclusion of Dr. Lowenthal as contrary to the objective medical evidence and followed the statements of Dr. Khatib who noted that the patient, while injured, could return to light duty work. As noted, the ALJ ultimately denied the application for disability benefits since Campbell had the residual functional capacity for light work.

After the ALJ rendered his decision, plaintiff submitted a final report by Dr. Khatib dated November 10, 1980 which once again stated that Campbell "is disabled from doing her regular work and should avoid lifting heavy objects and doing strenuous work." On appeal, plaintiff maintained that the letter clearly established her "disability," but the Appeals Council disagreed holding that this most recent medical opinion was consistent with Dr. Kha-

tib's prior reports which advised that while Campbell was disabled from performing her prior work, she could still perform light duty. It would appear that this conclusion is sound.

It is well established in the law that "[i]t is not the function of a reviewing court to determine *de novo* whether the claimant is disabled, but to decide whether the Secretary's decision is supported by substantial evidence." *Dousewicz* v. *Harris*, slip op. 2397, 2400 (2d Cir. April 8, 1981). With this in mind, the court will now review the evidence in the record. In his written opinion, the ALJ clearly explains that he focused on the plaintiff's allegations of pain. This court concludes that the ALJ properly weighed that evidence as required by the law. *See Vega* v. *Harris*, 636 F.2d 900 (2d Cir. 1981); *McLaughlin* v. *Secretary*, 612 F.2d 701 (2d Cir. 1980); *Marcus* v. *Califano*, 615 F.2d 23 (2d Cir. 1979). Moreover, since there was no substantial contradictory evidence, the ALJ, bound by Dr. Khatib's opinion regarding the extent both of the injuries and the plaintiff's ability to engage in certain activity, properly concluded that the plaintiff was not disabled as she was able to perform light work. *See Jock* v. *Harris*, slip op. 3589 (2d Cir. June 5, 1981); *Parker* v. *Harris*, 626 F.2d 225 (2d Cir. 1980).

Accordingly, since the findings of the ALJ and the Appeals Council are supported by substantial evidence, the decision is affirmed.

So Ordered.

/s/ Mark A. Constantino
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

81 C 155

CARMEN CAMPBELL

—*v.*—

SECRETARY, HEALTH AND HUMAN SERVICES

[Filed Apr. 29, 1981]

ORDER

After reviewing the record on appeal, the court finds that the determination of the Secretary is supported by substantial evidence. Accordingly, the petition is dismissed. A more detailed explanation will be forthcoming.

So ordered.

/s/ Mark A. Costantino
United States District Judge
April 28, 1981

APPENDIX C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

SOCIAL SECURITY ADMINISTRATION

P.O. Box 2518

Washington, D.C. 20013

SCC
REFER TO: 093-40-3689

OFFICE OF
HEARINGS AND APPEALS

December 31, 1980

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Carmen Campbell
79 Lorraine Street, Apt. B
Brooklyn, New York 11232

Dear Ms. Campbell:

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, the record before the administrative law judge, the additional evidence submitted, and the contentions made in support of the request.

Section 404.970 of Social Security Administration Regulations No. 4 (20 CFR 404.970) provides that the Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discre-

tion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence, or (4) there is a broad policy or procedural issue which may affect the general public interest. This section also provides that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

In reaching this conclusion, the Appeals Council considered the contentions set forth in your attorney's letter of November 13, 1980, and Dr. Reza Khatib's November 10, 1980 report that was submitted with Mr. Nazario's letter. When you filed your application on October 15, 1979, you alleged an inability to work as of December 1978. Dr. Khatib's report of May 14, 1979, states that you could return to work in early June if you avoided lifting heavy objects or strenuous work. The doctor considered your return to work important to your recovery. At the time of your office visit to Dr. Khatab on July 2, 1979, he was still of the opinion that you could return to light work. In his September 27, 1979 report, Dr. Khatib again stated that you should return to work with the same restrictions. When seen by your physician

on January 14, 1980, he was, again, of the opinion that you could have returned to light work. Dr. Khatib's November 10, 1980 report states you are disabled from doing your regular work and should avoid lifting heavy objects and strenuous work. This opinion would seem to be consistent with his previous reports in which he stated that you had the residual functional capacity to perform light work. The Dictionary of Occupational Titles describes your job as a hotel maid as light work, and in the Appeals Council's opinion, the weight of the evidence now of record does not demonstrate that you were precluded from light work activity for any consecutive 12 month period pertinent to your case. Thus, the recent information from Dr. Khatib has no material bearing on the decision in the Council's view, and would not change the administrative law judge's findings in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health and Human Services as the defendant and should include the so-

cial security number(s) shown at the top of this notice.

Sincerely yours,

/s/ David G. Danziger
DAVID G. DANZIGER
Member, Appeals Council

cc:

Mr. Rubin Nazario
Attorney at Law
Brooklyn, New York 11021

DBS, Baltimore, MD
DO, Boro Hall, Brooklyn, NY
HO, Greensboro, NC (ALJ Denning)

Form HA-518-U9 (11-78)
(Formerly HA-518)
SGC:dc 12/19/80

APPENDIX D

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

## DECISION

IN THE CASE OF CARMEN CAMPBELL

Claim for Period of Disability and
Disability Insurance Benefits—093-40-3689

This case is before the Administrative Law Judge on a Request for Hearing. Pursuant to said request and after due notice, a hearing was held on August 22, 1980, in New York, New York. Claimant personally appeared and testified. Although advised of the right to counsel, claimant proceeded without the assistance of a representative or attorney.

## ISSUES

The general issues before the Administrative Law Judge are whether the claimant is entitled to a period of disability and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended. The specific issues are whether the claimant was under a "disability," as defined in the Act and, if so, when such "disability" commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement.

## LAW AND REGULATIONS

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and

Section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d)(1) of the Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

Section 223(d)(2)(A) further provides that an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy."

Section 223(d)(3) defines a "physical or mental impairment" as an impairment that results from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

On November 28, 1978, there were published in the Federal Register (43 FR 55349) amendments to Social Security Administration Regulation No. 4, Subpart P. These amendments became effective on February 26, 1979.

As revised, Regulation 404.1503 ff. provides, in effect, that in cases where claimants with a severe impairment or impairments are not actually engaging in substantial gainful activity, they may be found disabled if their impairment or combination of im-

pairments meets the duration requirements and is listed in Appendix 1, Subpart P, Regulation No. 4, or is determined to be medically the equivalent of a listed Impairment.

Regulation 404.1513 discusses "Appendix 2," which sets forth rules reflecting the major functional and vocational patterns which are encountered in cases in which claimant[s] (1) are not actually engaging in substantial gainful activity, (2) do not qualify on medical considerations alone, and (3) are prevented by a medically determinable impairment from returning to their "vocationally relevant" past work. These regulations further provide, in effect, that when the findings of fact made as to all factors (age, education, transferability of skills, work experience, and maximum level of sustained work capability) coincide with the criteria of a rule, that rule directs a conclusion as to whether the claimant is "disabled" or "not disabled."

## EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the testimony at the hearing, the arguments made, and the documents described in the List of Exhibits attached to this decision.

## EVALUATION OF EVIDENCE

Essentially, the claimant alleges disability due to a back condition with a herniated disc. At the hearing, she testified that she had worked with a slipped disc for a number of years and had surgery in January of 1979. She testified that her left side is "practically numb" and that she receives therapy three times a week. She added that she also has high blood

pressure. Claimant is 5 feet, 6 inches tall and presently weighs 185 pounds, and she indicated that her normal weight is between 200-210 pounds. Claimant has been on a diet and she described her appetite as being good.

The medical evidence of record would establish that the claimant was hospitalized in January of 1979 and underwent a laminectomy for removal of a herniated disc. When seen in followup by Dr. Khatib on February 5, 1979, claimant was noted to have only mild limitation of lower back movements and no weakness. His only recommendation was that the claimant lose weight. (Exhibit 16) Similar findings were made by Dr. Khatib in followup visits, and when seen on July 5, 1979, the claimant's neurological examination was noted to be within normal limits and it was concluded that the claimant could return to light-duty work (Exhibits 17, 18, and 19) Again, on September 27, 1979, Dr. Khatib indicated that the claimant's neurological examination was within normal limits and that she should return to work, avoiding heavy lifting and strenuous exertion. (Exhibit 21) On October 24, 1979, Dr. Khatib noted upon neurological examination that there was a limitation of lower back movement with restricted straight leg raising but no weakness and no reflex changes. (Exhibit 22)

At the time of the hearing, the claimant produced several reports from Dr. Milton Lowenthal. Dr. Lowenthal indicated that he had first seen the claimant on February 19, 1980. At that time he noted that there was slight guarding of movements and moderate to marked tenderness over the lower lumbar spine. He noted no atrophy or shortening of the lower extremities, and range of motion and motor

power at the hips, knees, and ankles were normal. Straight leg raising was negative in the seated position and was resisted at 60 degrees on the right and 40 degrees on the left. Knee and ankle jerks were active and equal, sensation was normal, and plantar responses were flexor. Dr. Lowenthal noted at that time that the claimant's symptoms were mainly a result of prolonged guarding and disuse and that she should undergo theraphy directed at increasing tolerance for physical activity. (Exhibit 31) A similar report was made by Dr. Lowenthal on June 5, 1980. (Exhibit 28) However, in assessing the claimant's residual functional capacity as of August 14, 1980, Dr. Lowenthal opined that the claimant would be able to alternately sit or stand for only up to one hour or continuously sit or stand 30 minutes and that she would be limited to lifting and carrying up to 10 pounds. (Exhibit 29) Further, in a form dated August 14, 1980, Dr. Lowenthal checked that the claimant had a nerve root compression syndrome with pain and motion limitation in the back or neck and cervical or lumbar nerve root compression as evidenced by radicular distribution of sensory, motor, and reflex abnormalities. (Exhibit 32)

Based upon the preponderance of the objective medical evidence, we would concur with the assessment of Dr. Khatib that the claimant is capable of performing work activity of a light character. We find no basis to support the most recent statements of Dr. Lowenthal, and we find his residual functional capacity statement not to be in line with the objective findings and contrary to the statement of Dr. Khatib, the physician who treated the claimant. Further, we find it to be inconsistent with Dr. Lowenthal's own statements that the claimant's primary problem was

disuse, limiting tolerance for physical activity. While the claimant should not engage in any heavy lifting or strenuous exertional activity, it is felt that the claimant remains capable of performing light work.

"Sedentary work," as defined at Section 404.1510 and, as appropriate, at Section 416.910, places primary emphasis on the capacity to sit with some walking or standing and the adjunctive ability to lift and utilize objects of minimal weight. "Light work," as defined at Section 404.1510(c) and, as appropriate, Section 416.910(c) entails much the same capacity as sedentary work with the lifting of negligible weights, but *may* require a significant degree of walking or standing or push/pull maneuvers from a seated position. The functional implications of claimant's impairments, based upon medical data, have been previously described. Again, it is concluded that on such basis, the claimant retains sufficient residual functional capacity for light work.

In arriving at this decision, the Administrative Law Judge has given careful consideration to the claimant's allegations of pain and numbness. We find these not to be supported by the objective medical evidence. Because pain cannot be scientifically measured, the claimant's allegations and complaints relative thereto must be considered along with the diagnostic clinical data in determining whether disability exists. Each individual's tolerance for pain varies. This factor must also be considered in determining whether a claimant is disabled. However, the mere assertion of pain does not prevent a fact finder's conclusion based upon more persuasive evidence that either the asserted pain does not exist or is of such a degree that it does not foreclose gainful employ-

ment. Also, although it may well be that claimant has episodes of annoyance because of a particular condition, that factor alone does not create entitlement to disability benefits where the record otherwise indicates that the capacity to engage in substantial gainful activity persists. The courts have frequently held that the inability of a claimant to work without some pain or discomfort does not necessarily satisfy the test of disability under the Act. Thus, again, the claimant's testimony of pain and the incapacity resulting from pain is only one of the elements to be considered in reaching a determination of disability, but such evidence must be evaluated with due consideration for credibility, motivation, and the medical evidence of impairment.

As stated previously, it is recognized that pain is not an overt or measurable entity. The extent to which it exists in such degree that it interferes with sustained functioning is most difficult to assess. Some guidance in attempting to determine the existence and intensity of pain is secured by reviewing extraneous factors which tend to be a concomitant of the condition. For example, in many instances there may be loss of weight due to loss of appetite from incessant pain, muscle atrophy due to muscle guarding, severe and present muscular spasms, pathological neurological signs, prolonged bedrest, the use of an assistive brace or support, or the use of strong pain-killing medication for a prolonged period of time. In the instant case, none of the aforementioned factors exist to a significant degree. Although the aforementioned factors are not conclusive on the subject of pain, it would seem that they tend to imply, at most, a moderate level of symptomatology.

Although the claimant has alleged hypertension as a disabling impairment, this is not documented by the record. While the claimant may be taking antihypertensive medication, this would appear to be sufficient to keep the claimant's blood pressure in good control. There is no showing of any end-organ damage or of any functional restrictions imposed thereby.

Although significant, the claimant's impairments are not so severe as to meet or equal the severity described in the Secretary's "Listing of Impairments." Further, considering the aforementioned limitations, restrictions and physical capacity, and the character of the claimant's past work, we conclude that the claimant might not be able to return to any of her relevant past employment. Therefore, it becomes necessary to determine whether claimant can perform any other substantial gainful activity which exists in the national economy in substantial numbers, considering age, education, and past work experience as classified in the appropriate regulations, as well as claimant's residual functional/physical capacity. Again, it is concluded that the claimant remains capable of performing work activity of a light character.

At 52 years of age, the claimant is regulatorily considered to be a person closely approaching advanced age. She has completed a marginal education, but is able to read and speak English. Claimant's past work as a domestic has been of an unskilled character. Considering the claimant's age, education, and work background, with her residual functional capacity, it is concluded that Rule 202.10 of Table 2 to Appendix 2 of Subpart P, Regulation No. 4, dictates a finding that the claimant is not "disabled."

## FINDINGS

The Administrative Law Judge, having carefully considered the entire record in this case and based upon the preponderance of the credible evidence, makes the following specific findings in light of the law and regulations more fully set forth above:

1. That claimant met the special earnings requirement of the Act as of her alleged onset date, and this requirement continues to be met at least through the date of this decision; that claimant is not presently participating in substantial gainful activity;
2. That the medical evidence establishes that claimant has impairments of the musculoskeletal and cardiovascular systems;
3. That claimant's impairments, either singly or in combination, including the symptomatology arising therefrom, do affect the ability to perform basic work-related functions, but are not so severe as to attain the severity which either meets or equals that delineated in the Secretary's "Listings";
4. That claimant's past relevant work consisted of functioning as a domestic;
5. That claimant is unable to perform work as described;
6. That claimant retains the residual functional capacity for light work;
7. That claimant was born on January 15, 1928, and thus may be considered an individual closely approaching advanced age;
8. That claimant's highest educational attainment is of the marginal level;

9. That the claimant's past relevant work activity was of unskilled character;
10. That, considering her maximum sustained work capacity, age, education, and work experience, claimant must be found "not disabled"; and
11. That claimant was not under a "disability" as defined in the Social Security Act, as amended, at any time through the date of this decision.

DECISION

It is the decision of the Administrative Law Judge that, based on her application filed October 15, 1979, the claimant is not entitled to a period of disability or to Disability Insurance Benefits under Section 216(i) and Section 223, respectively, of the Social Security Act, as amended.

/s/ Oliver T. Denning
OLIVER T. DENNING
Administrative Law Judge

Date: September 26, 1980

jg/al

## APPENDIX E

## UNITED STATES COURT OF APPEALS
## SECOND CIRCUIT

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At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 11th day of February, one thousand nine hundred and eighty-two.

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No. 81-6108

CARMEN CAMPBELL, PLAINTIFF

—*v*—

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE

Filed Feb. 11, 1982

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, Secretary of the Department of Health and Human Services,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

By /s/ Francis X. Gendhart
FRANCIS X. GENDHART
Chief Deputy Clerk

# UNITED STATES COURT OF APPEALS
# FOR THE SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of November, one thousand nine hundred and eighty-one.

Present:

HON J. EDWARD LUMBARD,
HON. ELLSWORTH A. VAN GRAAFEILAND,
*Circuit Judges*
HON DUDLEY B. BONSAL,
*District Judge*

No. 81-6108

CARMEN CAMPBELL,
*Plaintiff-Appellant,*

*v.*

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,
*Defendant-Appellee.*

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the ap-

peal from a judgment of said District Court be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk
by Arthur Heller, Deputy Clerk

## APPENDIX F

## STATUTES AND REGULATIONS INVOLVED

1. 42 U.S.C. 405(a) provides:

(a) Rules and regulations; procedures

The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

2. 42 U.S.C. 423(d) provides:

(d) Disability

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months * * *.

* * * * *

(2) For purposes of paragraph (1)(A)—

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 402(e) or (f) of this title)

shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

* * * * *

(5) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.

3. 20 C.F.R. 404.1545 provides:

§ 404.1545 Your residual functional capacity.

(a) *General.* Your impairments may cause physical and mental limitations that affect what you can do in a work setting. Your residual functional capacity is what you can still do despite your limitations. If you have more than one impairment, we will consider all of your impairments of which we are aware. We consider your capacity for various functions as described

in the following paragraphs; (b) physical abilities; (c) mental impairments, and (d) other impairments. Residual functional capacity is a medical assessment. However, it may include descriptions (even your own) of limitations that go beyond the symtoms that are important in the diagnosis and treatment of your medical condition. Observations of your work limitations in addition to those usually made during formal medical examinations may also be used. These descriptions and observations, when used, must be considered along with the rest of your medical record to enable us to decide to what extent your impairment keeps you from performing particular work activities. This assessment of your remaining capacity for work is not a decision on whether you are disabled, but is used as the basis for determining the particular types of work you may be able to do despite your impairment. Then, using the guidelines in §§ 404.1560 through 404.1569, your vocational background is considered along with your residual functional capacity in arriving at a disability decision.

(b) *Physical abilities.* When we assess your physical abilities (e.g., strength) we assess the severity of your impairment(s) and determine your residual functional capacity for work activity on a regular and continuing basis. We consider your ability to do physical activities such as walking, standing, lifting, carrying, pushing, pulling, reaching, handling and the evaluation of other physical functions. A limited ability to do these things may reduce your ability to do work.

(c) *Mental impairments.* When we assess your impairment because of mental disorders, we consider factors such as your ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, co-workers and work pressures in a work setting.

(d) *Other impairments.* Some medically determinable impairments, such as skin impairments, epilepsy, and impairments of vision, hearing or other senses, postural and manipulative limitations, and environmental restrictions do not limit physical exertion. If you have this type of impairment, in addition to one that affects physical exertion, we consider both in deciding your residual functional capacity.

4. 20 C.F.R. 404.1560 to 404.1569 provides:

§ 404.1560 When your vocational background will be considered.

(a) *General.* We may consider vocational factors when you are applying for a period of disability, or disability insurance benefits as a disabled worker, or child insurance benefits based on disability before age 22.

(b) *Disability determinations in which vocational factors must be considered along with the medical evidence.* When we cannot decide whether you are disabled on medical evidence alone, we must use other evidence.

(1) We will use information from you about your age, education and work experience.

(2) We will consider your doctors' reports and hospital records as well as your statements and other evidence to determine your residual

functional capacity and how it affects the work you can do. Sometimes, to do this, we will need to ask you to have special examinations or tests. (See § 404.1517).

(3) If we find that you can no longer do the work you have done in the past, we will determine whether you can do other work (jobs) which exists in significant numbers in the nation's economy.

§ 40.1561 Your ability to do work depends upon your residual functional capacity.

If you can do your previous work (your usual work or other applicable past work), we will determine that you are not disabled. However, if your residual functional capacity is not enough to enable you to do any of your previous work, we must still decide if you can do any other work. To do this, we consider your residual functional capacity, and your age, education, and work experience. Any work (jobs) that you can do must exist in significant numbers in the national economy (either in the region where you live or in several regions of the country). Sections 404.1563-404.1565 explain how we evaluate your age, education, and work experience when we are deciding whether or not you are able to do other work.

§ 404.1562 If you have done only arduous unskilled physical labor.

If you have only a marginal education and work experience of 35 years or more during which you did arduous unskilled physical labor, and you are not working and are no longer able

to do this kind of work because of a severe impairment(s), we will consider you unable to do lighter work, and therefore, disabled. However, if you are working or have worked despite your impairment(s) (except where the work is sporadic or is not medically advisable), we will review all the facts in your case, and we may find that you are not disabled. In addition, we will consider that you are not disabled if the evidence shows that you have training or past work experience which enables you to do substantial gainful activity in another occupation with your impairment, either on a full-time or a reasonably regular part-time basis.

EXAMPLE: B is a 60-year-old miner with a fourth grade education who has a life-long history of arduous physical labor. B says that he is disabled because of arthritis of the spine, hips, and knees, and other impairments. Medical evidence shows a combination of impairments and establishes that these impairments prevent B from performing his usual work or any other type of arduous physical labor. His vocational background does not show that he has skills or capabilities needed to do lighter work which would be readily transferable to another work setting. Under these circumstances, we will find that B is disabled.

§ 404.1563 Your age as a vocational factor.

(a) *General.* "Age" refers to how old you are (your chronological age) and the extent to which your age affects your ability to adapt to a new work situation and to do work in competition

with others. However, we do not determine disability on your age alone. We must also consider your residual functional capacity, education, and work experience. If you are unemployed because of your age and you can still do a significant number of jobs which exist in the national economy, we will find that you are not disabled. We explain in detail how we consider your age as a vocational factor in Appendix 2. However, we will not apply these age categories mechanically in a borderline situation.

(b) *Younger person.* If you are under age 50, we generally do not consider that your age will seriously affect your ability to adapt to a new work situation. In some circumstances, however, we consider age 45 a handicap in adapting to a new work setting (see Rule 201.17 in Appendix 2).

(c) *Person approaching advanced age.* If you are closely approaching advanced age (50-54), we will consider that your age, along with a severe impairment and limited work experience, may seriously affect your ability to adjust to a significant number of jobs in the national economy.

(d) *Person of advanced age.* We consider that advanced age (55 or over) is the point where age significantly affects a person's ability to do substantial gainful activity. If you are severely impaired and of advanced age and you cannot do medium work (see § 404.1567(c)), you may not be able to work unless you have skills that can be used in (transferred to) less demanding jobs which exist in significant numbers in the national economy. If you are close

to retirement age (60-64) and have a severe impairment, we will not consider you able to adjust to sedentary or light work unless you have skills which are highly marketable.

(e) *Information about your age.* We will usually not ask you to prove your age. However, if we need to know your exact age to determine whether you get disability benefits or if the amount of your benefit will be affected, we will ask you for evidence of your age.

§ 404.1564 Your education as a vocational factor.

(a) *General.* "Education" is primarily used to mean formal schooling or other training which contributes to your ability to meet vocational requirements, for example, reasoning ability, communication skills, and arithmetical ability. However, if you do not have formal schooling, this does not necessarily mean that you are uneducated or lack these abilities. Past work experience and the kinds of responsibilities you had when you were working may show that you have intellectual abilities, although you may have little formal education. Your daily activities, hobbies, or the results of testing may also show that you have significant intellectual ability that can be used to work.

(b) *How we evaluate your education.* The importance of your educational background may depend upon how much time has passed between the completion of your formal education and the beginning of your physical or mental impairment(s) and by what you have done with your education in a work or other setting. Formal

education that you completed many years before your impairment began, or unused skills and knowledge that were a part of your formal education, may no longer be useful or meaningful in terms of your ability to work. Therefore, the numerical grade level that you completed in school may not represent your actual educational abilities. These may be higher or lower. However, if there is no other evidence to contradict it, we will use your numerical grade level to determine your educational abilities. The term "education" also includes how well you are able to communicate in English since this ability is often acquired or improved by education. In evaluating your educational level, we use the following categories:

(1) *Illiteracy.* Illiteracy means the inability to read or write. We consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name. Generally, an illiterate person has had little or no formal schooling.

(2) *Marginal education.* Marginal education means ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs. We generally consider that formal schooling at a 6th grade level or less is a marginal education.

(3) *Limited education.* Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semiskilled or skilled jobs. We generally consider

that a 7th grade through the 11th grade level of formal education is a limited education.

(4) *High school education and above.* High school education and above means abilities in reasoning, arithmetic, and language skills acquired through formal schooling at a 12th grade level or above. We generally consider that someone with these educational abilities can do semi-skilled through skilled work.

(5) *Inability to communicate in English.* Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn't speak and understand English to do a job, regardless of the amount of education the person may have in another language. Therefore, we consider a person's ability to communicate in English when we evaluate what work, if any, he or she can do. It generally doesn't matter what other language a person may be fluent in.

(6) *Information about your education.* We will ask you how long you attended school and whether you are able to speak, understand, read and write in English and do at least simple calculations in arithmetic. We will also consider other information about how much formal or informal education you may have had through your previous work, community projects, hobbies, and any other activities which might help you to work.

§ 404.1565 Your work experience as a vocational factor.

(a) *General.* "Work experience" means skills and abilities you have acquired through work you have done which show the type of work you may be expected to do. Work you have already been able to do shows the kind of work that you may be expected to do. We consider that your work experience applies when it was done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity. We do not usually consider that work you did 15 years or more before the time we are deciding whether you are disabled (or when the disability insured status requirement was last met, if earlier) applies. A gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply. The 15-year guide is intended to insure that remote work experience is not currently applied. If you have no work experience or worked only "off-and-on" or for brief periods of time during the 15-year period, we generally consider that these do not apply. If you have acquired skills through your past work, we consider you to have these work skills unless you cannot use them in other skilled or semi-skilled work that you can now do. If you cannot use your skills in other skilled or semi-skilled work, we will consider your work background the same as unskilled. However, even if you have no work experience, we may consider that you are able to do unskilled work because it requires little or no judgment and can be learned in a short period of time.

(b) *Information about your work.* Under certain circumstances, we will ask you about the work you have done in the past. If you cannot give us all of the information we need, we will try, with your permission, to get it from your employer or other person who knows about your work, such as a member of your family or a co-worker. When we need to consider your work experience to decide whether you are able to do work that is different from what you have done in the past, we will ask you to tell us about all of the jobs you have had in the last 15 years. You must tell us the dates you worked, all of the duties you did, and any tools, machinery, and equipment you used. We will need to know about the amount of walking, standing, sitting, lifting and carrying you did during the work day, as well as any other physical or mental duties of your job. If all of your work in the past 15 years has been arduous and unskilled, and you have very little education, we will ask you to tell us about all of your work from the time you first began working. This information could help you to get disability benefits.

§ 404.1566 Work which exists in the national economy.

(a) *General.* We consider that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions of the country. It does not matter whether—

(1) Work exists in the immediate area in which you live;

(2) A specific job vacancy exists for you; or

(3) You would be hired if you applied for work.

(b) *How we determine the existence of work.* Work exists in the national economy when there is a significant number of jobs (in one or more occupations) having requirements which you are able to meet with your physical or mental abilities and vocational qualifications. Isolated jobs that exist only in very limited numbers in relatively few locations outside of the region where you live are not considered "work which exists in the national economy". We will not deny you disability benefits on the basis of the existence of these kinds of jobs. If work that you can do does not exist in the national economy, we will determine that you are disabled. However, if work that you can do does exist in the national economy, we will determine that you are not disabled.

(c) *Inability to obtain work.* We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy, but you remain unemployed because of—

(1) Your inability to get work;

(2) Lack of work in your local area;

(3) The hiring practices of employers;

(4) Technological changes in the industry in which you have worked;

(5) Cyclical economic conditions;

(6) No job openings for you;

(7) You would not actually be hired to do work you could otherwise do; or

(8) You do not wish to do a particular type of work.

(d) *Administrative notice of job data.* When we determine that unskilled, sedentary, light, and medium jobs exist in the national economy (in significant numbers either in the region where you live or in several regions of the country), we will take administrative notice of reliable job information available from various governmental and other publications. For example, we will take notice of—

(1) *Dictionary of Occupational Titles,* published by the Department of Labor;

(2) *County Business Patterns,* published by the Bureau of the Census;

(3) *Census Reports,* also published by the Bureau of the Census;

(4) *Occupational Analyses,* prepared for the Social Security Administration by various State employment agencies; and

(5) *Occupational Outlook Handbook,* published by the Bureau of Labor Statistics.

(e) *Use of vocational experts and other specialists.* If the issue in determining whether you are disabled is whether your work skills can be used in other work and the specific occupations in which they can be used, or there is a similarly complex issue, we may use the services of a vocational expert or other specialist. We will decide whether to use a vocational expert or other specialist.

§ 404.1567 Physical exertion requirements.

To determine the physical exertion requirements of work in the national economy, we classify jobs as "sedentary," "light," "medium," "heavy," and "very heavy.' These terms have

the same meaning as they have in the *Dictionary of Occupational Titles*, published by the Department of Labor. In making disability determinations under this subpart, we use the following definitions:

(a) *Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

(b) *Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

(c) *Medium work.* Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium

work, we determine that he or she can also do sedentary and light work.

(d) *Heavy work.* Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. If someone can do heavy work, we determine that he or she can also do medium, light, and sedentary work.

(e) *Very heavy work.* Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. If someone can do very heavy work, we determine that he or she can also do heavy, medium, light and sedentary work.

§ 404.1568 Skill requirements.

In order to evaluate your skills and to help determine the existence in the national economy of work you are able to do, occupations are classified as unskilled, semi-skilled, and skilled. In classifying these occupations, we use materials published by the Department of Labor. When we make disability determinations under this subpart, we use the following definitions:

(a) *Unskilled work.* Unskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. For example, we consider jobs unskilled if the primary work duties are handling, feeding and offbearing (that is, placing or removing materials from machines which are automatic or operated by others), or machine tending, and a person can usually learn to do the

job in 30 days, and little specific vocational preparation and judgment are needed. A person does not gain work skills by doing unskilled jobs.

(b) *Semi-skilled work.* Semi-skilled work is work which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require alertness and close attention to watching machine processes; or inspecting, testing or otherwise looking for irregularities; or tending or guarding equipment, property, materials, or persons against loss, damage or injury; or other types of activities which are similarly less complex than skilled work, but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly to do repetitive tasks.

(c) *Skilled work.* Skilled work requires qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity of material to be produced. Skilled work may require laying out work, estimating quality, determining the suitability and needed quantities of materials, making precise measurements, reading blueprints or other specifications, or making necessary computations or mechanical adjustments to control or regulate the work. Other skilled jobs may require dealing with people, facts, or figures or abstract ideas at a high level of complexity.

(d) *Skills that can be used in other work (transferability).* (1) *What we mean by transferable skills.* We consider you to have skills

that can be used in other jobs, when the skilled or semi-skilled work activities you did in past work can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work. This depends largely on the similarity of occupationally significant work activities among different jobs.

(2) *How we determine skills that can be transferred to other jobs.* Transferability is most probable and meaningful among jobs in which—

(i) The same or a lesser degree of skill is required;

(ii) The same or similar tools and machines are used; and

(iii) The same or similar raw materials, products, processes, or services are involved.

(3) *Degrees of transferability.* There are degrees of transferability of skills ranging from very close similarities to remote and incidental similarities among jobs. A complete similarity of all three factors is not necessary for transferability. However, when skills are so specialized or have been acquired in such an isolated vocational setting (like many jobs in mining, agriculture, or fishing) that they are not readily usable in other industries, jobs, and work settings, we consider that they are not transferable.

§ 404.1569 Listing of Medical-Vocational Guidelines in Appendix 2.

The Dictionary of Occupational Titles includes information about jobs (classified by their exertional and skill requirements) that exist in the

national economy. Appendix 2 provides rules using this data reflecting major functional and vocational patterns. We apply these rules in cases where a person is not doing substantial gainful activity and is prevented by a severe medically determinable impairment from doing vocationally relevant past work. The rules in Appendix 2 do not cover all possible variations of factors. Also, as we explain in § 200.00 of Appendix 2, we do not apply these rules if one of the findings of fact about the person's vocational factors and residual functional capacity is not the same as the corresponding criterion of a rule. In these instances, we give full consideration to all relevant facts in accordance with the definitions and discussions under vocational considerations. However, if the findings of fact made about all factors are the same as the rule, we use that rule to decide whether a person is disabled.

5. The Medical-Vocational Guidelines, 20 C.F.R. Part 404, Subpart P, Appendix 2, provide:

APPENDIX 2—MEDICAL—VOCATIONAL GUIDELINES

Sec.

200.00 Introduction.

201.00 Maximum sustained work capability limited to sedentary work as a result of severe medically determinable impairment(s).

202.00 Maximum sustained work capability limited to light work as a result of severe medically determinable impairment(s).

203.00 Maximum sustained work capability limited to medium work as a result of severe medically determinable impairment(s).

204.00 Maximum sustained work capability limited to heavy work (or very heavy work) as a result of severe medically determinable impairment(s).

200.00 *Introduction.* (a) The following rules reflect the major functional and vocational patterns which are encountered in cases which cannot be evaluated on medical considerations alone, where an individual with a severe medically determinable physical or mental impairment(s) is not engaging in substantial gainful activity and the individual's impairment(s) prevents the performance of his or her vocationally relevant past work. They also reflect the analysis of the various vocational factors (i.e., age, education, and work experience) in combination with the individual's residual functional capacity (used to determine his or her maximum sustained work capability for sedentary, light, medium, heavy, or very heavy work) in evaluating the individual's ability to engage in substantial gainful activity in other than his or her vocationally relevant past work. Where the findings of fact made with respect to a particular individual's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled. However, each of these findings of fact is subject to rebuttal and the individual may present evidence to refute such findings. Where

any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled. In any instance where a rule does not apply, full consideration must be given to all of the relevant facts of the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations.

(b) The existence of jobs in the national economy is reflected in the "Decisions" shown in the rules; i.e., in promulgating the rules, administrative notice has been taken of the numbers of unskilled jobs that exist throughout the national economy at the various functional levels (sedentary, light, medium, heavy, and very heavy) as supported by the "Dictionary of Occupational Titles" and the "Occupational Outlook Handbook," published by the Department of Labor; the "County Business Patterns" and "Census Surveys" published by the Bureau of the Census; and occupational surveys of light and sedentary jobs prepared for the Social Security Administration by various State employment agencies. Thus, when all factors coincide with the criteria of a rule, the existence of such jobs is established. However, the existence of such jobs for individuals whose remaining functional capacity or other factors do not coincide with the criteria of a rule must be further considered in terms of what kinds of jobs or types of work may be either additionally indicated or precluded.

(c) In the application of the rules, the individual's residual functional capacity (i.e., the

maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs), age, education, and work experience must first be determined.

(d) The correct disability decision (i.e., on the issue of ability to engage in substantial gainful activity) is found by then locating the individual's specific vocational profile. If an individual's specific profile is not listed within this Appendix 2, a conclusion of disabled or not disabled is not directed. Thus, for example, an individual's ability to engage in substantial gainful work where his or her residual functional capacity falls between the ranges of work indicated in the rules (e.g., the individual who can perform more than light but less than medium work), is decided on the basis of the principles and definitions in the regulations, giving consideration to the rules for specific case situations in this Appendix 2. These rules represent various combinations of exertional capabilities, age, education and work experience and also provide an overall structure for evaluation of those cases in which the judgments as to each factor do not coincide with those of any specific rule. Thus, when the necessary judgments have been made as to each factor and it is found that no specific rule applies, the rules still provide guidance for decisionmaking, such as in cases involving combinations of impairments. For example, if strength limitations resulting from an individual's impairment(s) considered with the judgments made as to the individual's age, education and work experience correspond to (or closely approximate) the factors of a particular rule,

the adjudicator then has a frame of reference for considering the jobs or types of work precluded by other, nonexertional impairments in terms of numbers of jobs remaining for a particular individual.

(e) Since the rules are predicated on an individual's having an impairment which manifests itself by limitations in meeting the strength requirements of jobs, they may not be fully applicable where the nature of an individual's impairment does not result in such limitations, e.g., certain mental, sensory, or skin impairments. In addition, some impairments may result solely in postural and manipulative limitations or environmental restrictions. Environmental restrictions are those restrictions which result in inability to tolerate some physical feature(s) of work settings that occur in certain industries or types of work, e.g., an inability to tolerate dust or fumes.

(1) In the evaluation of disability where the individual has solely a nonexertional type of impairment, determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in this Appendix 2. The rules do not direct factual conclusions of disabled or not disabled for individuals with solely nonexertional types of impairments.

(2) However, where an individual has an impairment or combination of impairments resulting in both strength limitations and nonexertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the

strength limitations alone and, if not, the rule(s) reflecting the individual's maximum residual strength capabilities, age, education, and work experience provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations. Also, in these combinations of nonexertional and exertional limitations which cannot be wholly determined under the rules in this Appendix 2, full consideration must be given to all of the relevant facts in the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations, which will provide insight into the adjudicative weight to be accorded each factor.

201.00 *Maximum sustained work capability limited to sedentary work as a result of severe medically determinable impairment(s).* (a) Most sedentary occupations fall within the skilled, semi-skilled, professional, administrative technical, clerical, and benchwork classifications. Approximately 200 separate unskilled sedentary occupations can be identified, each representing numerous jobs in the national economy. Approximately 85 percent of these jobs are in the machine trades and benchwork occupational categories. These jobs (unskilled sedentary occupations) may be performed after a short demonstration or within 30 days.

(b) These unskilled sedentary occupations are standard within the industries in which they exist. While sedentary work represents a significantly restricted range of work, this range in

itself is not so prohibitively restricted as to negate work capability for substantial gainful activity.

(c) Vocational adjustment to sedentary work may be expected where the individual has special skills or experience relevant to sedentary work or where age and basic educational competence provide sufficient occupational mobility to adapt to the major segment of unskilled sedentary work. Inability to engage in substantial gainful activity would be indicated where an individual who is restricted to sedentary work because of a severe medically determinable impairment lacks special skills or experience relevant to sedentary work, lacks educational qualifications relevant to most sedentary work (e.g., has a limited education or less) and the individual's age, though not necessarily advanced, is a factor which significantly limits vocational adaptability.

(d) The adversity of functional restrictions to sedentary work at advanced age (55 and over) for individuals with no relevant past work or who can no longer perform vocationally relevant past work and have no transferable skills, warrants a finding of disabled in the absence of the rare situation where the individual has recently completed education which provides a basis for direct entry into skilled sedentary work. Advanced age and a history of unskilled work or no work experience would ordinarily offset any vocational advantages that might accrue by reason of any remote past education, whether it is more or less than limited education.

(e) The presence of acquired skills that are readily transferable to a significant range of skilled work within an individual's residual functional capacity would ordinarily warrant a finding of ability to engage in substantial gainful activity regardless of the adversity of age, or whether the individual's formal education is commensurate with his or her demonstrated skill level. The acquisition of work skills demonstrates the ability to perform work at the level of complexity demonstrated by the skill level attained regardless of the individual's formal educational attainments.

(f) In order to find transferability of skills to skilled sedentary work for individuals who are of advanced age (55 and over), there must be very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry.

(g) Individuals approaching advanced age (age 50-54) may be significantly limited in vocational adaptability if they are restricted to sedentary work. When such individuals have no past work experience or can no longer perform vocationally relevant past work and have no transferable skills, a finding of disabled ordinarily obtains. However, recently completed education which provides for direct entry into sedentary work will preclude such a finding. For this age group, even a high school education or more (ordinarily completed in the remote past) would have litle impact for effecting a vocational adjustment unless relevant work experience reflects use of such education.

(h) The term "younger individual" is used to denote an individual age 18 through 49. For those within this group who are age 45-49, age is a less positive factor than for those who are age 18-44. Accordingly, for such individuals: (1) who are restricted to sedentary work, (2) who are unskilled or have no transferable skills, (3) who have no relevant past work or who can no longer perform vocationally relevant past work, and (4) who are either illiterate or unable to communicate in the English language, a finding of disabled is warranted. On the other hand, age is a more positive factor for those who are under age 45 and is usually not a significant factor in limiting such an individual's ability to make a vocational adjustment, even an adjustment to unskilled sedentary work, and even where the individual is illiterate or unable to communicate in English. However, a finding of disabled is not precluded for those individuals under age 45 who do not meet all of the criteria of a specific rule and who do not have the ability to perform a full range of sedentary work. The following examples are illustrative: Example 1: An individual under age 45 with a high school education can no longer do past work and is restricted to unskilled sedentary jobs because of a severe medically determinable cardiovascular impairment (which does not meet or equal the listings in Appendix 1). A permanent injury of the right hand limits the individual to sedentary jobs which do not require bilateral manual dexterity. None of the rules in Appendix 2 are applicable to this particular set of facts, because this individual cannot perform the full range of

work defined as sedentary. Since the inability to perform jobs requiring bilaterial manual dexterity significantly compromises the only range of work for which the individual is otherwise qualified (i.e., sedentary), a finding of disabled would be appropriate. Example 2: An illiterate 41 year old individual with mild mental retardation (IQ of 78) is restricted to unskilled sedentary work and cannot perform vocationally relevant past work, which had consisted of unskilled agricultural field work; his or her particular characteristics do not specifically meet any of the rules in Appendix 2, because this individual cannot perform the full range of work defined as sedentary. In light of the adverse factors which further narrow the range of sedentary work for which this individual is qualified, a finding of disabled is appropriate.

(i) While illiteracy or the inability to communicate in English may significantly limit an individual's vocational scope, the primary work functions in the bulk of unskilled work relate to working with things (rather than with data or people) and in these work functions at the unskilled level, literacy or ability to communicate in English has the least significance. Similarly the lack of relevant work experience would have little significance since the bulk of unskilled jobs require no qualifying work experience. Thus, the functional capability for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial vocational scope for those individuals age 18-44 even if they are illiterate or unable to communicate in English.

TABLE NO. 1—RESIDUAL FUNCTIONAL CAPACITY: MAXIMUM SUSTAINED WORK CAPABILITY LIMITED TO SEDENTARY WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)

| Rule | Age | Education | Previous work experience | Decision |
|---|---|---|---|---|
| 201.01 | Advanced age | Limited or less | Unskilled or none | Disabled. |
| 201.02 | do | do | Skilled or semiskilled—skills not transferable [1]. | Do. |
| 201.03 | do | do | Skilled or semiskilled—skills transferable [1]. | Not disabled. |
| 201.04 | Advanced age | High school graduate or more—does not provide for direct entry into skilled work [2]. | Unskilled or none | Disabled. |
| 201.05 | do | High school graduate or more—provides for direct entry into skilled work [2]. | do | Not disabled. |
| 201.06 | do | High school graduate or more—does not provide for direct entry into skilled work [2]. | Skilled or semiskilled—skills not transferable [1]. | Disabled. |
| 201.07 | do | do | Skilled or semiskilled—skills transferable [1]. | Not disabled. |
| 201.08 | do | High school graduate or more—provides for direct entry into skilled work [2]. | Skilled or semiskilled—skills not transferable [1]. | Do. |
| 201.09 | Closely approaching advanced age. | Limited or less | Unskilled or none | Disabled. |

| | | | | |
|---|---|---|---|---|
| 201.10 | ....do | ....do | Skilled or semiskilled—skills not transferable. | Do. |
| 201.11 | ....do | ....do | Skilled or semiskilled—skills transferable. | Not disabled. |
| 201.12 | ....do | High school graduate or more—does not provide for direct entry into skilled work [3] | Unskilled or none | Disabled. |
| 201.13 | ....do | High school graduate or more—provides for direct entry into skilled work [3]. | ....do | Not disabled. |
| 201.14 | ....do | High school graduate or more—does not provide for direct entry into skilled work [3]. | Skilled or semiskilled—skills not transferable. | Disabled. |
| 201.15 | ....do | ....do | Skilled or semiskilled—skills transferable. | Not disabled. |
| 201.16 | ....do | High school graduate or more—provides for direct entry into skilled work [3]. | Skilled or semiskilled—skills not transferable. | Do. |
| 201.17 | Younger individual age 45-49. | Illiterate or unable to communicate in English. | Unskilled or none | Disabled. |
| 201.18 | ....do | Limited or less—at least literate and able to communicate in English. | ....do | Not disabled. |
| 201.19 | ....do | Limited or less | Skilled or semiskilled—skills not transferable. | Do. |

| Rule | Age | Edcation | Previous work experience | Decision |
|---|---|---|---|---|
| 201.20 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 201.21 | ....do | High school graduate or more | Skilled or semiskilled—skills not transferable. | Do. |
| 201.22 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 201.23 | Younger individual age 18-44. | Illiterate or unable to communicate in English. | Unskilled or none | Do.[4] |
| 201.24 | ....do | Limited or less—at least literate and able to communicate in English. | ....do | Do.[4] |
| 201.25 | ....do | Limited or less | Skilled or semiskilled—skills not transferable. | Do.[4] |
| 201.26 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do.[4] |
| 201.27 | ....do | High school graduate or more | Unskilled or none | Do.[4] |
| 201.28 | ....do | ....do | Skilled or semiskilled—skills not transferable. | Do.[4] |
| 201.29 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do.[4] |

[1] See 201.00(f).
[2] See 201.00(d).
[3] See 201.00(g).
[4] See 201.00(h).

202.00 *Maximum sustained work capability limited to light work as a result of severe medically determinable impairment(s).* (a) The functional capacity to perform a full range of light work includes the functional capacity to perform sedentary as well as light work. Approximately 1,600 separate sedentary and light unskilled occupations can be identified in eight broad occupational categories, each occupation representing numerous jobs in the national economy. These jobs can be performed after a short demonstration or within 30 days, and do not require special skills or experience.

(b) The functional capacity to perform a wide or full range of light work represents substantial work capability compatible with making a work adjustment to substantial numbers of unskilled jobs and thus generally provides sufficient occupational mobility even for severely impaired individuals who are not of advanced age and have sufficient educational competence for unskilled work.

(c) However, for individuals of advanced age who can no longer perform vocationally relevant past work and who have a history of unskilled work experience, or who have only skills that are not readily transferable to a significant range of semi-skilled or skilled work that is within the individual's functional capacity, or who have no work experience, the limitations in vocational adaptability represented by functional restriction to light work warrant a finding of disabled. Ordinarily, even a high school education or more which was completed in the remote past will have little positive impact on effecting a voca-

tional adjustment unless relevant work experience reflects use of such education.

(d) Where the same factors in paragraph (c) of this section regarding education and work experience are present, but where age, though not advanced, is a factor which significantly limits vocational adaptability (i.e., closely approaching advanced age, 50-54) and an individual's vocational scope is further significantly limited by illiteracy or inability to communicate in English, a finding of disabled is warranted.

(e) The presence of acquired skills that are readily transferable to a significant range of semi-skilled or skilled work within an individual's residual functional capacity would ordinarily warrant a finding of not disabled regardless of the adversity of age, or whether the individual's formal education is commensurate with his or her demonstrated skill level. The acquisition of work skills demonstrates the ability to perform work at the level of complexity demonstrated by the skill level attained regardless of the individual's formal educational attainments.

(f) For a finding of transferability of skills to light work for individuals of advanced age who are closely approaching retirement age (age 60-64), there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry.

(g) While illiteracy or the inability to communicate in English may significantly limit an individual's vocational scope, the primary work functions in the bulk of unskilled work relate to working with things (rather than with data or

people) and in these work functions at the unskilled level, literacy or ability to communicate in English has the least significance. Similarly, the lack of relevant work experience would have little significance since the bulk of unskilled jobs require no qualifying work experience. The capability for light work, which includes the ability to do sedentary work, represents the capability for substantial numbers of such jobs. This, in turn, represents substantial vocational scope for younger individuals (age 18-49) even if illiterate or unable to communicate in English.

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TABLE NO. 2—RESIDUAL FUNCTIONAL CAPACITY: MAXIMUM SUSTAINED WORK CAPABLITY LIMITED TO LIGHT WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)

| Rule | Age | Education | Previous work experience | Decision |
|---|---|---|---|---|
| 202.01 | Advanced age | Limited or less | Unskilled or none | Disabled. |
| 202.02 | ....do | ....do | Skilled or semiskilled—skills not transferable. | Do. |
| 202.03 | ....do | ....do | Skilled or semiskilled—skills transferable [1]. | Not disabled. |
| 202.04 | ....do | High school graduate or more—does not provide for direct entry into skilled work [2]. | Unskilled or none | Disabled. |
| 202.05 | Advanced age | High school graduate or more—provides for direct entry into skilled work [2]. | Unskilled or none | Not disabled. |
| 202.06 | ....do | High school graduate or more—does not provide for direct entry into skilled work [2]. | Skilled or semiskilled—skills not transferable. | Disabled. |
| 202.07 | ....do | ....do | Skilled or semiskilled—skills transferable [2]. | Not disabled. |
| 202.08 | ....do | High school graduate or more—provides for direct entry into skilled work [2]. | Skilled or semiskilled—skills not transferable. | Do. |
| 202.09 | Closely approaching advanced age. | Illiterate or unable to communicate in English. | Unskilled or none | Disabled. |

| | | | | |
|---|---|---|---|---|
| 202.10 | ....do | Limited or less—At least literate and able to communicate in English. | ....do | Not disabled. |
| 202.11 | ....do | Limited or less | Skilled or semiskilled—skills not transferable. | Do. |
| 202.12 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 202.13 | ....do | High school graduate or more. | Unskilled or none | Do. |
| 202.14 | ....do | ....do | Skilled or semiskilled—skills not transferable. | Do. |
| 202.15 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 202.16 | Younger individual | Illiterate or unable to communicate in English. | Unskilled or none | Do. |
| 202.17 | ....do | Limited or less—At least literate and able to communicate in English. | ....do | Do. |
| 202.18 | ....do | Limited or less | Skilled or semiskilled—skills not transferable. | Do. |
| 202.19 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 202.20 | ....do | High school graduate or more. | Unskilled or none | Do. |
| 202.21 | ....do | ....do | Skilled or semiskilled—skills not transferable. | Do. |
| 202.22 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |

[1] See 202.00(f).
[2] See 202.00(c).

203.00 *Maximum sustained work capability limited to medium work as a result of severe medically determinable impairment(s).* (a) The functional capacity to perform medium work includes the functional capacity to perform sedentary, light, and medium work. Approximately 2,500 separate sedentary, light, and medium occupations can be identified, each occupation representing numerous jobs in the national economy which do not require skills or previous experience and which can be performed after a short demonstration or within 30 days.

(b) The functional capacity to perform medium work represents such substantial work capability at even the unskilled level that a finding of disabled is ordinarily not warranted in cases where a severely impaired individual retains the functional capacity to perform medium work. Even the adversity of advanced age (55 or over) and a work history of unskilled work may be offset by the substantial work capability represented by the functional capacity to perform medium work. However, an individual with a marginal education and long work experience (i.e., 35 years or more) limited to the performance of arduous unskilled labor, who is not working and is no longer able to perform this labor because of a severe impairment(s), may still be found disabled even though the individual is able to do medium work.

(c) However, the absence of any relevant work experience becomes a more significant adversity for individuals of advanced age (55 and over). Accordingly, this factor, in combination with a limited education or less, militates

against making a vocational adjustment to even this substantial range of work and a finding of disabled is appropriate. Further, for individuals closely approaching retirement age (60-64) with a work history of unskilled work and with marginal education or less, a finding of disabled is appropriate.

TABLE NO. 3—RESIDUAL FUNCTIONAL CAPACITY: MAXIMUM SUSTAINED WORK CAPABILITY LIMITED TO MEDIUM WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)

| Rule | Age | Education | Previous work experience | Decision |
|---|---|---|---|---|
| 203.01 | Closely approaching retirement age. | Marginal or none | Unskilled or none | Disabled. |
| 203.02 | ....do | Limited or less | None | Do. |
| 203.03 | ....do | Limited | Unskilled | Not disabled. |
| 203.04 | ....do | Limited or less | Skilled or semiskilled—skills not transferable. | Do. |
| 203.05 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 203.06 | ....do | High school graduate or more | Unskilled or none | Do. |
| 203.07 | ....do | High school graduate or more—does not provide for direct entry into skilled work. | Skilled or semiskilled—skills not transferable. | Do. |
| 203.08 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 203.09 | ....do | High school graduate or more—provides for direct entry into skilled work. | Skilled or semiskilled—skills not transferable. | Do. |
| 203.10 | Advanced age | Limited or less | None | Disabled. |
| 203.11 | ....do | ....do | Unskilled | Not disabled. |
| 203.12 | ....do | ....do | Skilled or semiskilled—skills not transferable. | Do. |
| 203.13 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |

| | | | | |
|---|---|---|---|---|
| 203.14 | ....do | High school graduate or more | Unskilled or none | Do. |
| 203.15 | ....do | High school graduate or more —does not provide for direct entry into skilled work. | Skilled or semiskilled—skills not transferable. | Do. |
| 203.16 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 203.17 | ....do | High school graduate or more —provides for direct entry into skilled work. | Skilled or semiskilled—skills not transferable. | Do. |
| 203.18 | Closely approaching advanced age. | Limited or less | Unskilled or none | Do. |
| 203.19 | ....do | ....do | Skilled or semiskilled—skills not transferable. | Do. |
| 203.20 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 203.21 | ....do | High school graduate or more | Unskilled or none | Do. |
| 203.22 | ....do | High school graduate or more —does not provide for direct entry into skilled work. | Skilled or semiskilled—skills not transferable. | Do. |
| 203.23 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 203.24 | ....do | High school graduate or more —provides for direct entry into skilled work. | Skilled or semiskilled—skills not transferable. | Do. |
| 203.25 | Younger individual | Limited or less | Unskilled or none | Do. |
| 203.26 | ....do | ....do | Skilled or semiskilled—skills not transferable. | Do. |

| Rule | Age | Education | Previous work experience | Decision |
|---|---|---|---|---|
| 203.27 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 203.28 | ....do | High school graduate or more | Unskilled or none | Do. |
| 203.29 | ....do | High school graduate or more —does not provide for direct entry into skilled work. | Skilled or semiskilled—skills not transferable. | Do. |
| 203.30 | ....do | ....do | Skilled or semiskilled—skills transferable. | Do. |
| 203.31 | ....do | High school graduate or more —provides for direct entry into skilled work. | Skilled or semiskilled—skills not transferable. | Do. |

204.00 *Maximum sustained work capability limited to heavy work (or very heavy work) as a result of severe medically determinable impairments(s).* The residual function capacity to perform heavy work or very heavy work includes the functional capability for work at the lesser functional levels as well, and represents substantial work capability for jobs in the national economy at all skill and physical demand levels. Individuals who retain the functional capacity to perform heavy work (or very heavy work) ordinarily will not have a severe impairment or will be able to do their past work—either of which would have already provided a basis for a decision of "not disabled". Environmental restrictions ordinarily would not significantly affect the range of work existing in the national economy for individuals with the physical capability for heavy work (or very heavy work). Thus an impairment which does not preclude heavy work (or very heavy work) would not ordinarily be the primary reason for unemployment, and generally is sufficient for a finding of not disabled, even though age, education, and skill level of prior work experience may be considered adverse.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 371097 659

# Joint Appendix

Office-Supreme Court, U.S.
FILED
SEP 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1983

# In the Supreme Court of the United States

OCTOBER TERM, 1981

---

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

*v.*

CARMEN CAMPBELL

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## JOINT APPENDIX

---

JOHN C. GRAY, JR.
RUBEN NAZARIO
*Brooklyn Legal Services Corp. B*
*105 Court Street*
*Brooklyn, New York 11201*
*(212) 855-8003*

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

*Petition For Writ Of Certiorari Filed April 26, 1982*
*Certiorari Granted June 21, 1982*

# In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1983

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

*v.*

CARMEN CAMPBELL

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**Relevant Docket Entries**
**CV-81-0155**

1/19/81—By SIFTON, J. order dated 1/15/81 allowing plaintiff to proceed in forma pauperis, filed. pg (1)

1/19/81—Complaint filed, summons issued. pg (2)

1/23/81—Summons return filed/executed. el (3)

2/3/81—Copy of letter dtd 1/30/81 from Ben Wiles to Ms. Campbell, enclosing a copy of an order setting a date for a status conf., for 4/20/81 at 10 am. Filed. ls (4)

2/17/81—By COSTANTINO, J.—Stipulation dtd 2/10/81, extending deft's time to answer until 3/30/81. Filed. ls (5)

4/14/81—ANSWER to complaint with certified transcript, filed. ls (6)

4/20/81—Before CONSTANTINO, J., case called—counsel for both sides present, conf held & defts motion for summary judgment is argued & decision reversed. gv —

4/23/81—Notice of appearance of JOHN C. GRAY, JR as attorney for pltff, filed. pg (7)

4/29/81—By CONSTANTINO, J.—Order dtd 4/28/81, that the determination of the Secretary is supported by substantial evidence. Accordingly, the petition is dismissed. A more detailed explanation will be forthcoming. Filed. (c/m) ls (8)

4/30/81—Clerk's Judgment dtd 4/29/81, that the pltff take nothing of the deft and that judgment is hereby entered in favor of deft and against pltff dismissing the complaint. filed. (p/c sent) ls (9)

5/22/81—Stenographer's transcript dtd 4/20/81, filed gb (1)

5/28/81—NOTICE OF APPEAL FILED. Copies to all parties. el (11)

6/15/81—Scheduling order from the C of A that the record on appeal be filed on or before 6/30/81. Argument of the

appeal shall be ready to be heard during week of 8/31/81. Filed. ls (12)

6/30/81—Record on appeal certified and mailed to the C of A with certified copy of docket entries. pg

7/7/81—Acknowledgment from the C of A of receipt of the record on appeal. Filed.

7/28/81—By COSTANTINO, J. Memo of decision and order dated 7/27/81, affirming the decision of the Administrative Law Judge & the Appeals Council, filed. pg (14)

7/30/81—Judgment dtd 7-29-81 affirming the administrative decision filed (15)

**EXHIBIT 15**

November 9, 1978

Dr. Safanoff
161 Asland Place
Brooklyn, New York

RE: CARMEN CAMPBELL
79 Lorraine St.
Brooklyn, New York
Carrier No: 3532C38843
Emp: Americana Hotel

Dear Dr. Safanoff:

Mrs. Campbell was in to see me for neurological consultation on 11/6/78. She is 50 years of age and right handed. She is complaining of lower back pain extending to her left lower extremity. She went to Union Family Clinic and was referred to Dr. Walker on 34th Street. Therapy given did not help Mrs. Campbell is still complaining of intermittent severe lower back pain extending to left lower extremity. Pain is aggrevated by walking, bending, coughing, etc. She gets some relief on resting. She got slightly better and returned to work on Aug. 23rd, 1978 but still suffers from back pain radiating to left lower extremity. She returned to work for financial reasons.

She was injured at work for the first time in 5/14/73 and was out of work for about five weeks. Her compensation case was closed on Oct. 3, 1974. Since then she has been having intermittent radicular pain. In March of 75 she was admitted to Brooklyn Hospital put on traction and physiotherapy and got better. She was sent home but still have pain on and off until March of 78 when her pain became aggrevated and she stopped working.

*Past History:* No smoking or drinking.
*Neurological examination:* Elimination of lower back movement. Spasm of lumbar parabertrebral muscle. Restricted straight leg raising left. Weakness of extensor halluous longus muscle. Hypalgesis over dorsum of foot L5 dermatomic zone. No reflex changes.

*Impression:* Lumbar radicular syndrome probably due to herniated disc L4-L5 left.
*Recommendation:* Hospitalization for myelogram since patients symptoms and signs persist. Request for myelogram. Thank you for referring this patient to me.

Very truly yours,

Reza Khatib, M.I.C.P.
cc: Workmens compensation board

A/N _____
Exhibit No. 15

**EXHIBIT 16**

REZA KHATIB, M.D. P.C.
Tel. 212-464-4600

Reza Khatib, M.D., F.A.C.S.
Medical Suite
121 DeKalb Avenue
Brooklyn, N.Y. 11201

Reza Khatib, M.D., F.A.C.S.
86-74 Palermo Street
Holliswood, N.Y. 11423

2/6/79

Hartford Insurance Co.
123 William Street
New York City, New York

RE:Campbell, Carmen
79 Lorraine St.
Brooklyn, New York
Carrier No: 332C38843
Empl: Americana Hotel

Gentlemen:

Mrs. Campbell was admitted to Brooklyn Hospital on 1/2/79. She was seen and evaluated by Insurance Company's physician and authorization was given for surgery. (See previous report on 1/4/79). She had Laminectomy on 1/10/79 for removal of Herniated Disc. Post-op patient's radicular pain subsided and she was discharged on 1/24/79.

Today 2/5/79 Mrs. Campbell was in for a follow up office visit. Patient is doing well, she complains of mild pain in lower back. No more radicular pain.

Neurological Examination: Wound healed well. Mild limitation of lower back movements. No weakness. Patient weighs 198 lbs.

Recomendation: Reduce weight

Mrs. Campbell is to return to my office within 3 weeks.

Very truly yours,

Reza Khatib, M.D.,P.C.
REZA KHATIB, M.D.,P.C.
RK/ac
cc: Workmens Compensation Board

A/N _____
Exhibit No. 16

**EXHIBIT 17**

REZA KHATIB, M.D. P.C.
Tel. 212-464-4600

Reza Khatib, M.D., F.A.C.S.
Medical Suite
121 DeKalb Avenue
Brooklyn, N.Y. 11201

Reza Khatib, M.D., F.A.C.S.
86-74 Palermo Street
Holliswood, N.Y. 11423

2/28/79

Hartford Insurance Co.
123 Williams Street
New York City, New York

Re: Campbell, Carmen
79 Lorraine St.
Brooklyn, New York
Carrier No: 3532C38843
Empl: Americana Hotel

Gentlemen:

Mrs. Campbell was in to see me for a follow up visit on 2/26/79. Patient is doing better, she complains of mild pain and stiffness in lower back.

Neurological Examination: Wound healed well. Mild limitation of lower back movements. No reflex changes, no weakness.

Very truly yours,

REZA KHATIB, M.D.,P.C.
Rx/ac
cc: Workmens Compensation Board

A/N _____
Exhibit No. 17

**EXHIBIT 18**

REZA KHATIB, M.D. P.C.
Tel. 212-464-4600

Reza Khatib, M.D., F.A.C.S.
Medical Suite
121 DeKalb Avenue
Brooklyn, N.Y. 11201

Reza Khatib, M.D., F.A.C.S.
8874 Palermo Street
Holliswood, N.Y. 11423

May 14, 1979

Hartford Insurance Company
123 Williams Street
New York, New York

Re: Campbell, Carmen
79 Lorraine St.
Brooklyn, New York
Carrier No: 3532C38843
Empl: Americana Hotel
Sheraton Centre
7th Ave., N.Y., N.Y.

Gentlemen:

Mrs. Campbell was in to see me today for a follow up visit, the patient is feeling better. She still complains of mild soreness in lower back.

Neurological Examination: Wound healed well. Mild limitation of lower back movements. No weakness. No reflex changes.

Recommendation: Patient was admitted to hospital on 1/2/79, she had a Laminectomy on 1/10/79 for removal of herniated disc. She may return to work in early June only if she avoids

lifting heavy objects or strenuous work. This is important for patients recovery.

Very truly yours,

Reza Khatib, M.D.P.C.
R/Kpd
cc: Workmens Compensation Board
cc: Americana Hotel-Sheraton Centre

A/N _____
Exhibit No. 18

**EXHIBIT 19**

REZA KHATIB, M.D. P.C.
Tel. 212-464-4600

Reza Khatib, M.D., F.A.C.S.
Medical Suite
121 DeKalb Avenue
Brooklyn, N.Y. 11201

Reza Khatib, M.D., F.A.C.S.
86-74 Palermo Street
Holliswood, N.Y. 11423

July 5th, 1979

Hartford Insurance Company
123 Williams Street
New York, N.Y.

Re: CAMPBELL, CARMEN
79 Lorraine St.
Bklyn, N.Y.
Carrier No: 3532C38843
Empl: Americana Hotel-
Sheraton Centre
7th Ave. N.Y.C., N.Y.
D/A: Unknown

Gentlemen:

Mrs. Campbell was in to see me for a follow up office visit on 7/2/79.

Patient is doing better. Complains of occasional intermittent pain in lower back. She complains also of neck pains radiating to right upper extremity.

Patient states that there is no light duty job for her at her previous work.

Neurological Examination: Within Normal Limits.

Patient may return to light duty work.

Very truly yours,

Reza Khatib, M.D.P.C.
RK/pd
cc: Workmens Compensation Board
Americana Hotel-Sheraton Centre

A/N _____
Exhibit No. 19

**EXHIBIT 20**

REZA KHATIB, M.D. P.C.
Tel. 212-464-4600

Reza Khatib, M.D., F.A.C.S.
Medical Suite
121 DeKalb Avenue
Brooklyn, N.Y. 11201

Reza Khatib, M.D., F.A.C.S.
86-74 Palermo Street
Holliswood, N.Y. 11423

Aug. 1st, 1979

Hartford Insurance Company
123 William Street
New York, N.Y.

Re: CAMPBELL, CARMEN
79 Lorraine St.
Bklyn, N.Y.
Carrier #3532C38843
Empl: Americana Hotel-Sheraton Centre
D/A: Unknown

Gentlemen:

Mrs. Campbell was in to see me for a follow up office visit on 7/30/79. Patient's condition has remained unchanged. She still complains of lower back pain after walking, standing for a while or lifting a heavy object.

Neurological Examination: No neurological findings.

Very truly yours,

Reza Khatib, M.D.P.C.
RK/pd
cc: Workmens Compensation Board
Americana Hotel

A/N _____
Exhibit No. 20

**EXHIBIT 21**

REZA KHATIB, M.D. P.C.
Tel. 212-464-4600

Reza Khatib, M.D., F.A.C.S.
Medical Suite
121 DeKalb Avenue
Brooklyn, N.Y. 11201

Reza Khatib, M.D., F.A.C.S.
86-74 Palermo Street
Holliswood, N.Y. 11423

September 27th, 1979

Hartford Insurance Co.
123 Williams Street
New York, N.Y.

RE: CAMPBELL, CARMEN
79 Lorraine Street
Carrier #3532C38843
Empl: Americana Hotel-Sheraton Centre
D/A: Unknown

Gentlemen:

Mrs. Campbell was in to see me for a follow up office visit on 9.25.79. The patient is eager to return to work, but her employer does not want her. She still has mild pain in lower back, no radicular pain.

*Neurological Examination:* Within Normal Limitations.

Patient should return to work, avoid lifting heavy objects and strenuous work.

Very truly yours,

Reza Khatib, M.D., P.C.
RK/pd
cc: Workmens Compensation Board
Americana Hotel

A/N _____
Exhibit No. 21

**EXHIBIT 22**

REZA KHATIB, M.D. P.C.
Tel. 212-464-4600

Reza Khatib, M.D., F.A.C.S.
Medical Suite
121 DeKalb Avenue
Brooklyn, N.Y. 11201

Reza Khatib, M.D., F.A.C.S.
86-74 Palermo Street
Holliswood, N.Y. 11423

10-24-79

Hartford Insurance Co.
123 Williams Street
New York, N.Y.

RE: CARMEN CAMPBELL
79 Lorraine Street
Emp: Americana Hotel-
Sheraton Centre
Carrier No: 3532C38843
D/A: Unknown

Gentlemen:

Mrs. Campbell was in to see me for a follow up office visit on 10/22/79. The patient states that she is willing to return to work but her employer does not want her.

She is complaining of lower back pain radiating to left lower extremity.

Neurological Examination: Limitation of lower back movements with restricted straight leg raising. No weakness. No reflex changes.

Very truly yours,

Reza Khatib, M.D.,P.C.
RK/pd
cc: Workmens Compensation Board

A/N _____
Exhibit No. 22

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

# DISABILITY DETERMINATION AND TRANSMITTAL

DR

| 1. DETERMINATION | 2. DDB CODE | 3. FILING DATE | 4. SSN |
|---|---|---|---|
| DDB ☑ BDI ☐ CAB ☐ DIO ☐ | 330 | 10/15/79 | 093-40-3689 |

5. NAME AND ADDRESS OF CLAIMANT

Carmen Campbell
Apt 2D
79 Lorraine St
Brooklyn NY 11231

6. WE'S NAME (If CDB or DWB Claim) 56

7. TYPE CLAIM (Title II) DIB ☑ FZ ☐ DWB ☐ CDB-A ☐ CDB-C ☐ RD-A ☐ RD-C ☐ RB ☐ P-A ☐ P-C ☐

8. TYPE CLAIM (Title XVI) DI ☐ DS ☐ DC ☐ BI ☐ BS ☐ BC ☐

| 9. DATE OF BIRTH | 10. PRIOR ACTION | 11. REMARKS |
|---|---|---|
| 01/15/28 | ☐ PD ☐ PT | 212-855-4388 ADO 12/30/78 |

12. DISTRICT/BRANCH OFFICE ADDRESS
1 Willoughby St
Brooklyn NY 11201

DO-BO CODE 106

1979 OCT 17 AM 8:14

13. DO-BO REPRESENTATIVE DRT

14. DATE 10/16/79

## DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED

15. CLAIMANT DISABLED
A ☐ DISABILITY BEGAN _____ B ☐ DISABILITY CEASED _____

16. DIAGNOSIS
Lumbar Disc Disease
L5-S1

17. RE-EXAM
☐ NONE
☐ _____ (Date)

18. CASE OF BLINDNESS AS DEFINED IN SEC. 1614(a)(2)/216(i)
A ☐ NOT DISAB. FOR CASH BENE. PURP. B ☐ DISAB. FOR CASH BENE. PURP. BEG. _____

19. CLAIMANT NOT DISABLED
A ☐ THROUGH DATE OF CURRENT DETERMINATION B ☐ THROUGH _____ C ☐ BEFORE AGE 22 (CDB Only)

| 20. VOCATIONAL BACKGROUND | OCC. YRS. | ED. YRS. | 21. VR ACTION |
|---|---|---|---|
| Chamber maid - Hotel | unknown | unknown | SC. IN A ☐ SC. OUT B ☐ PREV. REF. C ☐ |

| 22. REG. BASIS CODE | 23. MED. LIST. NO. | 24. MOB. CODE | 25. REVISED DET. | 26. LIST NO. |
|---|---|---|---|---|
| 51-15=2 (4) | | 6 | ☐ | |

27. RATIONALE

☒ SEE ATTACHED SSA-831

28.
A ☐ PERIOD OF DISABILITY B ☐ DISABILITY PERIOD
C ☐ ESTAB. BEG. _____ AND D ☐ CONTINUES
E ☐ TERM. _____

29. LTR./PAR. NO.

30. DISABILITY EXAMINER-DDB [signature] 31. DATE 11/30/79

32. REVIEW PHYSICIAN-DDB, E Gutman 33. DATE 12/1/79

34. REMARKS

EXHIBIT 2
Exhibit No. 2 (2)

| 35. BASIS CODE | 36. REV. DET. CODES | 37. SSA REPRESENTATIVE | SECTION | 38. DATE |
|---|---|---|---|---|

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Social Security Administration

CONTINUATION SHEET
FOR DISABILITY DETERMINATION

GE:elc 4

| CONTINUATION OF RATIONALE OF SSA-831 OR SSA-833 | | | 57 |
|---|---|---|---|
| NAME OF CLAIMANT | WE'S NAME (If CDB or DWB Claim) | SSN | TYPE OF CLAIM |
| Carmen Campbell | | 093-40-3689 | DIB |

Allegations:

Herniated disc and hypertension.

Sources:

Brooklyn Hospital
Dr. Reda Khatib

Facts:

Neurological exam shows that the claimant has low back pain after excision of herniated disc. There is restricted straight leg raising but no weakness or atrophy or reflex changes.

Hospital progress notes showed no evidence of end organ involvement regarding claimant's hypertension.

Combination of impairments is not severe and there is no interference with any work related activity. Claim is denied.

(INITIAL AND DATE)

**EXHIBIT 3**

**Social Security Disability Denial Notice**

From: Department Of Health Education And Welfare
Social Security Administration

Date: Dec. 10, 1979
Claim Number: 093-40-3689 A

Carmen Campbell
Apt 2D
79 Lorraine St
Brooklyn NY 11231

We have determined that you are not entitled to disability benefits. In reaching this decision we considered how much your condition has affected your ability to work. After carefully studying your records, including the medical evidence and your statements, and considering your age, education, training, and experience, it has been determined that your condition is not disabling within the meaning of the law. If your condition should get worse and prevent you from doing any substantial gainful work, you should get in touch with any social security office about filing another disability application.

Your social security record at the time you filed your application shows that you meet the earnings requirement for disability purposes until 12/31/83. Any additional earnings which may be credited to your record after the time you applied may, of course, extend this date. (An explanation of the disability requirement and the earnings requirement is given on the back of this notice.)

The decision on your claim was made by the Social Security Administration on the basis of a disability determination by an agency of the state in which you live. Physicians and other trained disability evalua-

tion personnel in the state agency participate in making such determinations.

According to your present earnings record and the date of birth you gave us you have enough credit for work under social security to qualify you for retirement benefits at age 62.

If you believe that this determination is not correct, you may request that your case be re-examined. If you want this reconsideration, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. If you have additional evidence, submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the determination made on your claim.

If you do not request reconsideration of your case within the prescribed time period, you still have the right to file another application at any time.

Important: See other side for information about your claim.

Department of Health, Education, and Welfare
Social Security Administration

Form SSA-L793-C1 (2-79)(Formerly SSA-L793)
Prior editions may be used until supply is exhausted.

A/N _____
Exhibit No. 3

**EXHIBIT 31**

February 19, 1980

Re: Ms. Carmen Campbell
355 C 38843
D.I.: 1/15/73
Flagship Americana

Mr. Arnold Malin
The Hartford Insurance Group
P.O. Box 17
New York, New York 10038

Dear Mr. Malin:

At your request I saw Ms. Campbell in my office on this date.

Ms. Campbell sustained a low back injury on January 15, 1973 while working at her regular job. Pain was across the low back and radiated to below the left knee. Though still in pain, she returned to work in five weeks. She continued working but occasionally had to stop for periods ranging up to four months. In December 1978 pain was quite severe. Ms. Campbell was hospitalized. In January 1979 the patient had surgery for a herniated disc. In June 1979 she tried again to return to work but was refused a job in the sewing section. Pain is present at all times mainly in the low back on the left. Sitting tolerance twenty minutes. Standing tolerance one hour. Walking is limited to two blocks. Sleep is not disrupted by pain.

Past History: Hypertension over ten years controlled with a diuretic.

Examination: Height 5'6''. Weight 202 pounds. Blood pressure: 148/88. Movements are slightly guarded. Lumbar curve is increased. There is moderate to marked tenderness over the lower lumbar spine. Pelvis is level. Forward flexion of low back 40 degrees. Extension and left lateral flexion of 20 degrees. Right lateral flexion 40 degrees. No atrophy or shortening of the lower extremities. Range of motion and motor power at hips, knees and ankles normal. SLR is resisted on the right at 60 degrees and 40 degrees on the left. In the sitting position

SLR is negative bilaterally. Knee jerks and ankle jerks active and equal. Plantar responses are flexer. Sensation is normal. Feet pulses normal.

Impression: Symptoms are mainly a result of prolonged guarding and disuse. Patient has a partial disability, which may become permanent.

Recommendation: Rehabilitation therapy directed at gradually increasing tolerance for physical activity should be promptly started. Treatment will be given three times weekly. Ms. Campbell's ability to benefit from therapy will be evaluated after six sessions.

Thank you for referring the patient.

Sincerely yours,

Milton Lowenthal, M.D.
SM 1 200929

ML:l

A/N _____
Exhibit No. 31

Received During
Hearing
Exhibit No. 31

**EXHIBIT 24**

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES
Bureau of Disability Determinations
110 William Street, New York, New York 10038
Barbara B. Blum
Commissioner

Toll Free: (800) 522-5511
In NYC: (212) 587-3113

Date:
Claimant: Carmen Campbell
Adress: 79 Lorraine St.
ress:Brooklyn N.Y. 11231
Soc. Sec. No.: 093-40-3689
Module: CR-3
Date of Birth: 1/15/28
Patient No.:

Reza Khatib, M.D.
121 DeKalb Ave.
Brooklyn, N.Y. 11201

Thank you for the medical information you provided in a recent telephone conversation regarding the above claimant. A written consent is enclosed for us to receive this information from you.

Your patient has made an application for benefits under the program identified below and we need medical evidence from treatment sources to evaluate the claim.

☒ *Claim for Social Security Disability Benefits (Title II):* The claimant is required by law to furnish medical evidence in support of the claim and is responsible for any cost.

☐ *Claim for Supplemental Security Income (Title XVI):* The law authorizes us to pay for medical evidence that is relevant and is used to adjudicate the claim. The enclosed certification should be signed in Item 5 and returned with

your report so that we may process any payment that may be due without further contact with your office.

Please verify the summary on the reverse of this letter by signing and dating the original in the spaces provided and return it in the enclosed envelope. You may make any revisions deemed necessary.

Your cooperation will be appreciated and enable us to make a prompt decision on this claim.

Sincerely yours,

Harry R. Pace M.D.
HARRY R. PACE, M.D.
Chief Medical Consultant

Enclosure
DF-254 (1/80)

PLEASE SIGN SUMMARY ON REVERSE AND RETURN ONE COPY OF THIS LETTER

**CONFIRMATION OF MEDICAL DATA**
(Reverse) DF-254

Claimant Carmen Campbell Soc. Sec. No. 093-40-3689

I provided the following information by telephone, in connection with the claim for Social Security disability benefits identified above, to A. Scarimbolo on 3/11/80:

> This patient was first seen on 11/6/78; the date of her last visit was 1/14/80. The diagnosis is herniated disc L5-S1 on the left.
>
> The patient had a laminectomy one year ago in January. She still complains of low back pain and numbness. On the patient's last visit she complained of mild low back pain radiating to the left lower extremity. Her left leg feels numb intermittently. There is limitation of back motion and restricted straight leg raising. There is no weakness or reflex changes. I recommended a physiotherapy and weight reduction. The patient was advised not to lift anything heavy, and if she returned to work, it should be to light duty.

In addition, I have attached materials checked below:

- ☐ EKG tracings
- ☐ Report of X-rays
- ☐ Other _____

Physician signature: _____ M.D.

Name Typed: Reza Khatib, M.D.

A/N _____
Exhibit No. 24

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION

# DISABILITY DETERMINATION AND TRANSMITTAL

Form Approved
OMB No. 72R523

| 1 DESTINATION | 2 DOB CODE | 3 FILING DATE | 4 SSN |
|---|---|---|---|
| DOB [X] RSI [ ] CAB [ ] DIB [ ] | 330 | 10/15/79 | 093-40-3689 60 |

5 NAME AND ADDRESS OF CLAIMANT
Carmen Campbell
79 Lorraine St. #2D
Brooklyn, NY 11231

6 HES NAME (If CDB or DWB Conv)

7 TYPE CLAIM (Title II)
DIB [X] FE [ ] DWB [ ] CDB-A [ ] CDB-O [ ] RD-A [ ] PD-O [ ] AD [ ] P-A [ ] P-O [ ]

8 TYPE CLAIM (Title XVI)
OI [ ] DS [ ] OC [ ] BI [ ] BS [ ] BC [ ]

9 DATE OF BIRTH: 01/15/28

10 PRIOR ACTION: [X] PD [ ] PT

11 REMARKS: Rec'd in S/A 1/22/80
Recon filed 1/17/80
AOD 12/30/78
212-855-4388

12 DISTRICT/BRANCH OFFICE ADDRESS
1 Willoughby St.
Brooklyn, NY 11201

DO-BO CODE: 106

13 DO-BO REPRESENTATIVE

14 DATE

## DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED

15 CLAIMANT DISABLED
A [X] DISABILITY BEGAN _____ B [ ] DISABILITY CEASED _____

16 DIAGNOSIS: Herniated disc L5-S1

17 RE-EXAM: [ ] NONE [ ] _____ (Date)

18 CASE OF BLINDNESS AS DEFINED IN SEC. 1614(a)(2)/216(i)
A [ ] NOT DISAB FOR CASH BENE PURP B [ ] DISAB FOR CASH BENE PURP BEG _____

19 CLAIMANT NOT DISABLED
A [X] THROUGH DATE OF CURRENT DETERMINATION B [ ] THROUGH _____ C [ ] BEFORE AGE 22 (CDB Only)

| 20 VOCATIONAL BACKGROUND | OCC. YRS | LD YRS | 21 VR ACTION | 22 REG. BASIS CODE | 23 MED. LIST NO | 24 MOB. CODE | 25 REVISED DET | 26 LIST NO |
|---|---|---|---|---|---|---|---|---|
| Maid (Motel) | 12 | Trade School | SC IN A [X] SC OUT B [ ] PREV REF C [ ] | ~~N3+502(b)~~ | | G | X | |

27 RATIONALE
#1 - 1502(b)

[X] SEE ATTACHED SSA-831

28 A [ ] PERIOD OF DISABILITY B [ ] DISABILITY PERIOD
C [ ] ESTAB BEG _____ AND D [ ] CONTINUES
E [ ] TERM _____

29 LTR./PAR NO

30 DISABILITY EXAMINER-DDS: A. Jeremiah — 31 DATE: 3/19/80

32 REVIEW PHYSICIAN-DDS: L. Lengmann — 33 DATE: 3/21/80

34 REMARKS
DAB Tier 1 Review made.
Recon Affirmation

EXHIBIT 5
Exhibit No. 5 (7)

| 35 BASIS CODE | 36 REV CAT CODES | 37 SSA REPRESENTATIVE | SECTION | 38 DATE |
|---|---|---|---|---|
| | D — 4 | | | |

FORM SSA-831 US (8-77) (FORMERLY SSA-831)
PRIOR EDITIONS MAY BE USED UNTIL SUPPLY IS EXHAUSTED

1 - FOLDER COPY

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Social Security Administration

CONTINUATION SHEET
FOR DISABILITY DETERMINATION

| CONTINUATION OF RATIONALE OF SSA-831 OR SSA-833 | | | 61 |
|---|---|---|---|
| NAME OF CLAIMANT | WE'S NAME (IF CDB or DWB Claim) | SSN | TYPE OF CLAIM |
| Carmen Campbell | | 093 - 40 - 3689 | 018 |

I. List of Sources

| Name | Date | Type of Source |
|---|---|---|
| Reza Khatib, M.D | 3/11/80 (Exh. 2A)<br>1/14/78 to present (Exhs. 15-22) | Treating Physician |
| Brooklyn Family medical office | 1-2-79 to present (Exh. 14) | Treating Physician |
| Brooklyn Hospital | 1-2-79 to 1-24-79 (Exh. 14) | Inpatient Notes |

II Claimant's Allegations

The claimant is alleging disability due to a herniated disc and hypertension.

III Facts

Medical evidence shows that the claimant had a laminectomy for a herniated disc at the level of L-5 S-1 in 1979. The claimant at present has mild low back pain. There is some limitation of back motion and restricted leg raising but there is no weakness or reflex changes.

The claimant's most recent blood pressure reading was within normal limits.

The claimant is 52 years old with a two decade education. Her past work was as a maid in the hotel industry which is considered light work. It is felt that the claimant has the capacity to perform her past work as she

IV Conclusion

It is felt that the claimant maintains the capacity to perform her past work as a maid therefore claim is denied.

(INITIAL AND DATE)

| DISABILITY EXAMINER DDS | DATE | MEDICAL CONSULTANT DDS | DATE | DISABILITY EXAMINER SSA | DATE | DISABILITY EXAMINER SSA | DATE |
|---|---|---|---|---|---|---|---|
| M | 3/19/80 | [signature] | 3/21/80 | | | | |

FORM SSA-834-US (10-77) OBSOLETE 06-80
PRIOR EDITIONS MAY BE USED UNTIL SUPPLY IS EXHAUSTED

1-FOLDER COPY

**EXHIBIT 28**

June 5, 1980

Re: Ms. Carmen Campbell
355 C 38843
D.I.: 1/15/73
Flagship Americana

Mr. Arnold Malin
The Hartford Insurance Group
P.O. Box 17
New York, New York 10038

Dear Mr. Malin:

Ms. Campbell was seen by me on this date in my office for a re-evaluation visit.

The patient had begun to respond to a rehabilitation program which was terminated when she was hospitalized for an unrelated condition. She had been resting at home for the past two months and low back pain returned to its previous level. Sitting tolerance is less than 30 minutes. Standing tolerance is one hour. Walking is limited to two blocks.

Examination: Movements are moderately guarded. The lumbar curve is increased. Gait is slow but normal. Pelvis is level. There is diffuse tenderness over the entire lumbar spine and adjacent soft tissue, especially so on the left. Forward flexion of low back 30 degrees. Extension and left lateral flexion less than 20 degrees. Right lateral flexion 30 degrees. No atrophy or shortening of the lower extremities. Range of motion and motor power evaluation limited by guarding but appears to be normal at hips, knees and ankles. SLR is resisted on the right at 40 degrees and at 30 degrees on the left. Knee jerks and ankle jerks active and equal. Plantar responses are flexor.

Impression: Disuse remains the main problem in limiting tolerance for physical activity.

Recommendation: Rehabilitation therapy will be resumed and progress will be re-evaluated after six sessions.

Sincerely yours,

Milton Lowenthal, M.D.
SM 1 200 929

ML:l

RECEIVED DURING
HEARING
Exhibit No. 28

NR. OF PAGES ____

August 8, 1980

Mr. Arnold Malin
The Hartford Insurance Group
P.O. Box 17
New York, New York 10038

Dear Mr. Malin:

I saw Ms. Campbell in this re-evaluation of her status in .

There has been slow progress for physical activity. She is now comfortable lying supine. Walking, standing and sitting abilities

Examination: Movements remain very guarded. Local findings are unchanged.

Recommendation: Continue treatment creasing emphasis on exercise and activity at home. Ms. Campbell shows a dramatic response to further therapy she will be discharged to home exercise within one month.

Sincerely yours,

Milton Lowenthal, M.D.

BEST TYPED COPY OF THE
FOLLOWING PAGE FOR
LEGIBILITY

QUESTIONNAIRE AS TO RESIDUAL FUNCTIONAL CAPACITY: PHYSICAL IMPAIRMENT

Name of Patient: CARMEN CAMPBELL

Social Security No. 113

Dear Doctor:

Please answer the following questions with regard to your patient's claim for Social Security disability benefits. Please base your answers on how your patient's medical conditions affect his/her ability to function.

1. Nature, frequency and length of contact: FIRST EXAM 2/19/80. Re-eval 6/5/80 + 8/5/80

2. Please describe patient's symptoms (including patient reports of pain, dizziness, etc.) Severe Low back PAIN since work RELATED INJURY 1/15/73 HAS A LAMINECTOMY FOR LUMBAR DISC in Jan 1979 but PAIN PERSISTS

3. State all clinical findings, laboratory and test results. HEIGHT 5'6" WT 202 lbs B.P. 140/66 MOVEMENTS slightly guarded. FORWARD FLEXION OF LOW BACK 40° EXTENSION + LEFT LATERAL FLEXION 20°. RIGHT LATERAL FLEXION 40° SLR RESISTED ON RT AT 60° + LEFT 40° KT + AT ACTIVE + EQUAL. SENSATION NORMAL

EXHIBIT 29

SECURITY ADMIN
EX 29

Diagnosis STATUS POST LAMINECTOMY FOR HERNIATED DISC

114

5. Treatment and response, including list of medications prescribed and their side effects HEAT, MOBILITY + LOW BACK EXERCISE THERE HAS BEEN NO CHANGE IN TOLERANCE FOR PHYSICAL ACTIVITY

6. Prognosis: AFFECTS FOR

7. Has the patient's impairment lasted or can it be expected to last at least twelve months? Yes ✓ No ____

8. How long can the patient continuously stand? 30 MIN

9. How long can the patient continuously sit? 30 MIN

10. How long can the patient alternately sit or stand at one time? 1 hour

11. Does the patient have to lie down during the day? Yes If yes, please explain. SEVERE LOW BACK PAIN

12. How many city blocks can the patient walk without stopping? 2

13. How many pounds can the patient lift?

None up to 10 lbs. 11-20 lbs. 21-50 lbs. over 50 lbs.

14. How many pounds can the patient carry?

None up to 10 lbs. 11-20 lbs. 21-50 lbs. over 50 lbs.

15. Does the patient have any problems performing such functions as grasping, pushing, pulling or doing fine manipulations with his/her hands? NO If yes, please explain. ____

16. Does the patient have any problems bending, squatting, kneeling or turning parts of his/her body? Yes If yes, please explain. (Please give any applicable range of motion studies.)

BENDING & SQUATTING VERY RESTRICTED 115

17. Is the patient able to travel alone by bus? Yes By subway? Yes

18. Does the patient have any sight or hearing impairment? No

19. Comments:

Date: 6/14/82

Signed: Milton Lowenthal M.D.

Print Name MILTON LOWENTHAL

Address: 340 E. 24TH ST

NY 10010

Department Of
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Bureau Of Hearings And Appeals

# TRANSCRIPT

| In the case of | Claim for |
|---|---|
| Carmen Campbell<br>(claimant) | Period of Disability and<br>Disability Insurance Benefits |
| _____<br>(wage earner) (leave blank if same as above) | 093-40-3689<br>(Social Security Number) |

**Hearing Held**
**at**
**New York, New York**
**on**
**August 22, 1980**

**Appearances** Carmen Campbell, Claimant

O.T. DENNING
Administrative Law Judge

CANDY BARKER
Hearing Assistant

**INDEX OF TRANSCRIPT**

| In the Case of: | Account Number: |
|---|---|
| Carmen Campbell, Claimant | 093-40-3689 |

Testimony of Carmen Cambell ..... Commencing p. 1

(The following is a transcript of the hearing held before O. T. Denning, an Administrative Law Judge of the Office of Hearings and Appeals, Social Security Administration, Department of Health and Human Services, on August 22, 1980, at New York, New York, in the case of Carmen Campbell, claimant in her own behalf and based on her own earnings record, social security account number 093-40-3689. The claimant, Carmen Campbell, appeared in person.)

(The hearing commenced at 12:00 noon, August 22, 1980.)

OPENING STATEMENT BY ADMINISTRATIVE LAW JUDGE:

ALJ: The hearing is in order. Would you please stand. Raise your hand.

Move closer to the microphone.

(The claimant, CARMEN CAMPBELL, having been first duly sworn, testified as follows:)

EXAMINATION BY ADMINISTRATIVE LAW JUDGE:

Q. State your full name and address?

A. My name is Carmen Jessie (phonetic) Campbell, single. Right now I still—well should I state my mother's name (phonetic).

Q. I didn't understand anything you said. Please start over again. I want to know your name and address as if I was going to write you a letter and you were going to get it in the mail. Just tell me who to write it, address it to, where to address it to, zip code and all. Start, please.

A. Carmen, I guess it's Campbell. 79 Lorraine Street, Apartment 2D, like in Daisy, Brooklyn, New York 11231.

Q. Thank you. Can you be reached by telephone?

A. Yes, sir.

Q. What's that numer?

A. 855-4388.

Q. In the notice of hearing, Miss Campbell, you were advised of your rights to be represented at this hearing by an attorney—

A. Yes.

Q. —or other qualified person of your choice. Since you are appearing here alone on your own behalf, I assume that you're prepared to go forward with the hearing without a representative. Is this correct?

A. Yes, sir, because I tried to seek a representative and I asked the Legal Aid, they told me that they couldn't assist and those who could assist me was charging me $35, an awful lot, and I do not have any money to pay this.

Q. This is what Legal Aid told you? They're gonna charge you $35?

A. No, they told me that they couldn't—that they didn't have anyone available.

Q. I see.

A. The others who I contacted told me that I'd have to pay them $35 for a lawyer and I do not have that kind of money.

Q. All right. And you are ready to go forward without a representative, are you?

A. I would have to, sir, because for the present moment if things get too difficult on me I would have to try and see if I could find one. But right now I'm willing to go forward and see what I can do to help myself.

Q. All right. I might say this to you. If you want legal assistance or help and they are busy now, the case could be put off at a later time and whenever they could represent you. But if you want to go forward today and see what the evidence is and see if you need—need a representative, we are ready to do so.

A. I'm willing to go forward.

Q. All right. It is indicated by the record that you made a timely request for a hearing based on your application filed under Title II of the Social Security Act, as amended. You requested a hearing before an Administrative Law Judge. I am the Administrative Law Judge with the Office of Hearings and Appeals who will conduct your hearing. The record of the

proceeding is being made by tape recording. I will be taking evidence as to the severity and the expected duration of your impairments, whether your impairments are of such severity as to prevent the performance of your past relevant work, and whether you have the residual capacity to perform other types of work taking into account your age, education and work history. There is a lot of instances that we can take in evidence on your residual functional capacity to engage in sedentary, light, medium, or heavy work. This essentially, what we're taking into account, your ability to walk, stand, sit, lift, push, pull or carry.

I will take evidence and consider any mental, skin, sensory or environmental impairment that might limit your capacity to work.

Evidence will also be taken as to your age, education and work experience. The general issue and specific issues were sent out in your notice of hearing. I'll briefly cover them at this time.

Primary issue is disability. The disability must be medically determined physical or mental impairment which is expected to last for a continuous period of at least 12 months or result in death. There must be an inability to engage in substantial gainful activity, and that inability must be by reason of the impairment.

I've gone through your file and selected the documents which I consider pertinent. And they have been identified as Exhibits Number 1 through 27. I understand that you have had an opportunity to review these documents. Is this correct?

A. Yes, sir.

Q. Do you object to having these documents put into evidence?

A. No, sir.

Q. There being no objection, Exhibits Number 1 through 27 are admitted into evidence and made part of the record.

Did you bring additional medical reports? I believe you did. Today that you would like added to the file?

You showed me a paper in writing entitled Workmen's Compensation Board, Notice of Decision. This will be received and identified as Exhibit Number—You showed me a paper in

writing dated June the 5th, 1980, signed by Wilson Lowenthal (phonetic), M.D. This will be received and identified Exhibit Number 28.

You showed me another paper in writing which appears to have been signed by Wilson— he same doctor, is it not?

A. Yes, sir. I'm going to (inaudible) there.

Q. All right. This will—and dated August 14, 1980. This will be received and identified Exhibit Number 29.

You showed me another papar in writing which is barely—I can't hardly tell what he's saying on this one, but it's the same doctor, and I can't even make out the date, but we'll identify it as Exhibit Number 30.

You showed me another paper in writing dated February 19, 1980, signed by the same physician, Dr. Lowenthal. This will be identified as Exhibit Number 31.

And you showed me another paper in writing dated August 14, 1980. And this seems to be a physical evaluation—I don't believe this one's signed.

A. When I went to the Legal Aid he gave me those papers and told me he said he could get a doctor's signature for me.

Q. Uh-huh.

A. You know.

Q. Did Dr. Lowenthal fill this out?

A. Yes, he filled this out. But finally I, you know, I signed both that—I was sent there by the insurance company so I don't know what—what good would it make to where my interests—

Q. I see.

A. Because he's working for the insurance company.

Q. All right. We'll—We will receive any that you want to submit and identify Exhibit Number 32. And you've shown me a Notice of Decision from the Workmen's Compensation Board. We'll receive this. And this will be identified Exhibit Number 33. All of them become a part of the record.

After the hearing I will carefully study the record and determine whether you can be found under disability based solely on your medical condition. If not, I will consider whether your impairments are severe and prevent you from performing your

past relevant work. If so, I will determine if you have the residual capacity to perform sedentary, light, medium or heavy work. Finding will also be made as to your age, education and work experience. The rules contained in Appendix 2 of the Regulations will be applied in determining whether you are disabled. If you—does not have—if you are—If your case does not fall under a particular rule or you have some non-exertional impairments, the rule will be used as a frame of reference to determine whether you are disabled.

Before we get into the main issue and that is the issue of disability, there are some things I should tell you about the hearing. The procedure is very simple. We are making a record. The record will consist of your testimony that you will offer plus the medical reports that's in your file, plus if there are any additional medical reports you may care to submit. And you may submit medical evidence until—until you get a final decision.

After we get all that information before us, we will evaluate it and we'll issue a decision, a written decision, and you will get a copy of it. Now you may not like that decision. If you don't like the decision there are appeal rights on this decision. Very simply, take decision that you receive to the Social Security Office and tell them that you want to appeal. And they will issue the necessary papers and be sent to Washington, D.C. for review. They will evaluate your case and issue a decision. You may not like that decision either. If you don't like that decision, you can appeal it again.

The decision's the important thing, of the moment, is to make a clear record so that if you appeal to Washington, you won't be able to go. They will listen to your testimony as it was given here this morning.

If you go to court, you won't be able to go there and testify either. They will just go on the record. They will give a decision based on the record.

Further we would like to make a clear decision. I would like for you to talk plainly and transfer your voice, testimony, can be understood later if you do it clearly. I'm not saying you're

gonna have to, I don't know until I get all the evidence before me. I'll ask you the questions. Be sure to respond to those questions with words, yes or no, and the information that is called for. If you're having problems in different parts of your body such as pain in a joint or swelling, name the place or area rather than say I hurt here or I'm swollen and I can't bend this joint. I may understand your answer, but it won't be recorded on the equipment. This may hurt you if you appeal. We won't know whether you're talking about your back, your arms, your legs, your knees or where. So if it hurts your knee, say it, it's my right knee, my left elbow, my lower back. Whatever the problem is, name it so they'll know.

Before we get into that, however, there are some further documentation we need to do and I'll start by asking you to state your birth date.

A. The 15th of January 1928.

Q. How old are you now?

A. 52.

Q. Married?

A. Recently.

Q. You are married?

A. Just one year ago.

Q. All right. How many times have you been married?

A. This is the second time.

Q. How did your first marriage end? One of two ways, death or divorce?

A. Divorce.

Q. And who got the divorce, you or your husband?

A. I did.

Q. Who were you married to?

A. Augustus Hines (phonetic).

Q. And were there children born of that marriage?

A. Yes, sir.

Q. How many?

A. Two.

Q. Are either one of those children dependent on you for support now?

A. Right, my daughter.

Q. And how old is the daughter?
A. Well, she's 23. She's just out of Hunter College.
Q. She's out—just out of college?
A. She's just out of college.
Q. And when was she 23?
A. She was 23—She was—She will be 24 in November of this year.
Q. In November. She was 23 in last November?
A. Last November.
Q. All right.
A. But she just came out of college this last month.
Q. I see, all right. She would probably be eligible for any benefits going from your—your eligibility because she's not in college and 23 years old.
What is your height?
A. 5'6".
Q. Present weight?
A. 185.
Q. Is that your usual weight?
A. No, sir.
Q. What should it be?
A. It generally runs from 200 to 210 but I am on a diet.
Q. When was the last time that you recall that you weighted 210?
A. Before my operation.
Q. And when was that?
A. The 10th of January 1979.
Q. All right. Have you been lower than 185?
A. No, sir.
Q. Appetite good, fair or poor?
A. Very good, too good.
Q. Sleeping good, fair or poor?
A. Poor, sir.
Q. Smoke cigarettes?
A. No, sir.
Q. Ever smoke?
A. No, sir.
Q. Use alcohol to any extent?

A. No, sir.
Q. Ever have an alcoholic problem?
A. No, sir.
Q. Drive an automobile, have a license?
A. No, sir.
Q. Are you right-handed or left-handed?
A. Right-handed.
Q. The highest grade you completed in school?
A. I went to the sixth grade in elementary school, finished.
Q. Where did you go to school?
A. In Panama.
Q. How long have you been in the states?
A. 16 years coming October 4th. I'm an American citizen right now.
Q. How many—Have you attended any English classes here? Have you picked up the English—
A. No, sir, just picked up my English since I came here.
Q. Your native tongue is Spanish?
A. Spanish, sir.
Q. Do you speak another language other than Spanish?
A. No.
Q. Do you—Do you read English?
A. I read it, but the writing is a little difficult.
Q. You can understand it when you hear it spoken?
A. Yes, I understand, but my pronunciation is not that good.
Q. Uh-huh. Your writing, it is poor. Your reading it is fair to good?
A. I can—
Q. And you can understand it fairly well?
A. Yes, sir.
Q. All right. Have you had military training or service?
A. No, sir.
Q. Have you had vocational training?
A. No, sir.
Q. Do you have any income now from any source that you depend on? Weekly or monthly check?
A. Well, they're giving me $48 a week.
Q. That's Welfare?
A. No, compensation.

Q. Oh, compensation. 48 a week.

A. Uh-huh.

Q. Do you know how long that will last?

A. Well the last time that I went to the hearing I was served by the—by the New York State doctor who prescribed that time the state therapy for three more months. After three months I don't know what will be—what will happen.

Q. Okay. Uh-huh. Any other income that you depend on now other than your Workmen's Comp.?

A. No, sir, I—I married last year, the 24th of August with expectation to get help, but due to my sickness and all the different, you know, things that I had, my marriage is ending and the (inaudible).

Q. Uh-huh.

A. That's the reason why I'm trying to get my—some kind of help so I can sustain my therapy.

Q. I don't believe I asked you this, but there were no children born of the last marriage?

A. No, sir, just—it just coming up a year.

Q. Uh-huh. Then you and your husband haven't adopted any children?

A. No, sir.

Q. But you are still living together now?

A. Sometimes we are.

Q. I beg your pardon?

A. I said sometimes we are. He comes and goes.

Q. I see. So you'd call your—within the conditions of probably (phonetic)?

A. Yes, sir.

Q. Last July when you got married were you fine and in good health then?

A. No, sir, I was in—I was in—I had a (inaudible) operation. I lost everything that, you know, that I worked for. My Red Cross (phonetic) and everything like that. And I think he married me on the basis of pity.

Q. Uh-huh.

A. But it was too much for him to handle, I guess.

Q. How long had—How long had you known him?

A. I knowed him for a long time because he was—he used to take me back and forth to work in his car because I couldn't walk and I used to, you know, pay him for taking me back and forth. So I guess it was pity when he saw it in that I wasn't working and everything had turned over on me. He asked me to marry him.

Q. He was—

A. And I would say that he's a good person but to each his own.

Q. And are your children living at home with you now?

A. Yes, my daughter.

Q. Your daughter. Is she working now?

A. No, sir, she's just out of school and she is taking different courses, you know, Brooklyn College.

Q. You're not working now?

A. No, sir, I can't.

Q. When was the last time you was full-time employed?

A. December 1978, the 10th of December, 1978, was the last year I worked.

Q. What were you doing then?

A. I was a maid then.

Q. Where, I mean was you in a hospital or a motel or in a private home?

A. The Sheraton Center of New York.

Q. That's a motel, isn't it?

A. A hotel.

Q. Hotel?

A. Yes.

Q. How long have you followed maid work whether it was in a private home or you were in a commercial place? How long have you done that type of work?

A. Well, when I came to the United States I came over on a job. I came with (inaudible) and I worked with him for a period of, I think it was a year and nine months, sir. But I left my children in Panama and I sent for them—I had sent for them from working from the sister's (phonetic) family, you know, who told you they would keep the children for you. And then they changed their mind. So sending for the children, I could no

longer work with the Dennises (phonetic) so I gotten this—that job. I got a third job, it was the 5th of June—of August of 1966 and the children came in the 14th of August 1966. So I—I was to leave that job so I could sleep home. I couldn't be with them. And I had been working there ever since this—until December—

Q. Okay, wait a minute. You said 1966?

A. Yes, sir, 12 years and four months.

Q. As a maid now you did general housework as it is done in a public hotel?

A. Yes.

Q. Making beds. Cleaning rooms, dusting and that type work?

A. And before—when—when the—when I had my accident I was a seamstress in at the—and a uniform care.

Q. You were the what?

A. A seamstress.

Q. A seamstress?

A. Yes.

Q. In a uniform—in a what?

A. In a uniform room. And I was a uniform—

Q. And were you working in the—in a—in the uniform—

A. Yes, and then I'd do the both jobs, you know.

Q. Uh-huh. Was this for the hotel?

A. Yes, sir, the same department—

Q. In other words you had moved up from maid to that?

A. Yes, sir.

Q. Where did you learn that skill?

A. I learned it from a friend of mine.

Q. Uh-huh.

A. I learned it from a friend.

Q. How long did you do that?

A. I did that from—I did that from 1971 until 1974. After my accident, one year after my accident they send me back upstairs as a maid.

Q. Which was the hardest job, the sewing or the maid?

A. The maid job. The maid job, sir.

Q. Why did they send you back to the hardest job?

A. Well, because I figured they send me to their doctor and their doctors thought definitely that what was wrong with my

back, which I think it was just a pull, that I pulled something in my back, and this was a way of getting rid of me because I was going to create problems because they knew that I couldn't push those trucks and I couldn't make the beds. And I tried to tell them this and they didn't—they said, well, it was just that I have to do the maid job or else I will just have to leave.

Q. Did they assign someone else to the other job?

A. Off and on they did. But the union were looking at them and off and on they did. And I tried to see if they could put me off in 1975 I got sick. I tried to see if they could—if they would give me back the job. They told me no. And there have been a lot of tricks in it, you know, because they put people behind my back in the job and I've been looking to see and the union, too, you know, been trying to see if they would put anyone else in there. But they say they put them off and on. They wouldn't take anyone steady.

Q. Well did your supervisors change? Did you have the same person over you that was over you all the time?

A. All the time, sir. The same lady that I work five years as a maid which I have all kind of recommendation that she gave me. I was a good maid. And she told me, well, come I want to give you a little—I heard you sew, so will you come down and help me, I need you. And I came down and I sewed there from '71, '72, '73, I had the accident. By '74 she no longer want me in the sewing room.

Q. How many other people were sewing at the same time you were sewing?

A. Well, while I was sewing it was three of us and this was—this was her excuse that she no longer needs people since she only wants two. And she send me upstairs. And for the period of two years she would bring me down whenever they go on vacation or whenever she need anyone to fill in. She used to bring me down, you know.

Q. After you had your injury, accident, could you do the sewing job?

A. Mister, I had my two kids, my two children to support. And I tried to do anything just to bring in something because I

feel that I brought them into the United States, and I was told that they should not become a federal charge.

Q. Uh-huh.

A. And I've never asked for work here. I have never asked for anything. This is the first time that I'm—that I'm asking for help.

Q. Uh-huh.

A. And I believe that I brought these children in—I brought my son, he was 11. And my daughter was 9. And through my accident my son was to leave college and he went to the Navy. And he avoided me because he wouldn't understand. They say you cannot hurt them. And he use a word (inaudible) and he don't pay me any mind. So and I didn't want to lose my daughter, too, so I've been working with a slipped disc for four years before I took my operation.

Q. How did that come about? How did you hurt your back?

A. Well, while working in the laundry room, when she transferred me from upstairs to downstairs, I was assigned to come in every Saturday morning at 7:30 in the morning and open the laundry room. So when I came in, I had been doing it for—from '71 I been doing it and everything was fine. Somewhere around '73 I find that whenever I comes on Saturday morning, there's always a load of trucks with heavy—the big trucks with linen that they take off the beds. And these fellows sort them and sending them to the laundry. So what happen is that there isn't any laundry—there isn't anywhere in the corridor for them to put the trucks so they stuck it into the laundry room. So I comes in—I'm the only person that comes in at 7:30 in the morning. So I do not have no help from the department or someone to help me take the trucks out. I generally ask someone to help me. So when—when I find that this was going on continuously I told my boss, I says, they are putting trucks in the room and you see, sir, when I come—when I tried to walk in the door, the trucks are right inside of the door, so that I cannot go in. And then, you know, everybody is trying to get to their post. Everybody—the cooks want to get into the kitchen. The maids and there are people of all nation (phonetic). And if you do not give them a uniform, so that they get to their post, they

(inaudible) you up. So I always try to get there ahead of time so I can get things arranged, so I could have the facility of just giving it to them, you know.

So when I told my boss and says they are putting those trucks in there and I cannot get them out, so he told me that he was gonna see to it that they don't put their trucks in no more. It stopped for awhile and started again. And when I told it to one of the delegates of the union and she called the lady that was in charge and she told her, the second boss, he got mad, and he says, "You know what, I think you just cannot—

(OFF THE RECORD TO CHANGE TAPE).

CLAIMANT:—stop complaining." Because I complained, that if I keep on complaining I was going to lose my job. So whenever I come and I see the trucks in there, I would either try to get someone to take it out for me, or I would try to take it out myself.

BY ALJ:

Q. Now what size truck are you talking about?

A. Oh, big trucks, sir. I guess they carry about 200 pounds.

Q. All right.

A. So it so happened that this morning I came, that Saturday morning I came and the trucks was in there. And I look around to see if I could find someone to help me and I never see—and I couldn't get no one. And as my children tell me, I always want to play a superwoman and I try to get the truck out and I, you know, wrestle with it and it seems like from wrestling with to get the truck out I either sprained my back or I think I just pulled a muscle. But from then they had to send me to Emergency.

Q. Uh-huh. And did you later have surgery because of that?

A. Yes, sir.

Q. What year did you have surgery?

A. Well when I got sick in '75 the doctor told me that I had slipped a disc.

Q. Uh-huh.

A. But after awhile they told me what the operation was all about and I didn't want to take it until at least my daughter could, you know, finish school.

Q. Uh-huh.

A. So I never take it until—

Q. Were you able to continue working?

A. I was working off and on. They gave me—They gave me from the first—beginning they gave me some corset to wear. And I been working with a corset for approximately four years.

Q. Uh-huh. So—So you continued to work awhile until the time you put your daughter through school.

A. Yes, sir.

Q. And then later you did have surgery?

A. Yes, sir.

Q. And that surgery was done when?

A. The 10th of January, 1979.

Q. And did you work up till the surgery?

A. Did I work? I stopped working the 10th of December. I stopped working the 10th of December of 1978.

Q. 1978? But you had surgery, you said in '79?

A. Yes.

Q. What did you do—

A. No, January—January 1979.

Q. January 1979? Oh, so you weren't out but about a week, about a month?

A. Yes.

Q. About a month and you had surgery. What hospital were you in?

A. Well I went to Brooklyn Hospital.

Q. And how have you been since the surgery.

A. At the first—you know the first six months I figured more or less, I was just thinking that maybe I would lose the job. I have never lost. I always have a pain in my right—in my left side that goes straight down through my left leg. And it gets me in the heel of the legs (phonetic). And I feel needles. And then my leg's getting heavy and it, you know, I cannot walk. I cannot sit too long. I cannot stand too long. I cannot stretch.

Q. Can you bend?

A. I cannot bend. The doctor warned me not to lift weights.

Q. Uh-huh.

A. And—

Q. I notice you have stood up several times since you've been in here.

A. Yes, because—

Q. Is it because it's—

A. Needles and pins.

Q. You're uncomfortable?

A. It's uncomfortable.

Q. And then you stand awhile and you—

A. I've got to sit. I have to sit.

Q. You have to—Do you have to alternate? To keep on standing or if you do—or you get tired of standing as well as sitting?

A. If I stand too much it bothers me. If I sit too much it bothers me. I—I can't lift. I can't lift this whole side is practically, you know, numb.

Q. Now this whole side, which side are you referring to?

A. The left side is practically numb. And then—

Q. What about the left arm?

A. The left arm I can't—I can't raise. I can't do anything too much. Since I'm going to therapy they are trying to see if they can try to relax my muscles.

Q. You're going to therapy now? How often do you go?

A. Three times a week (inaudible).

Q. How long are you there when you go?

A. An hour. One hour.

Q. It doesn't make any difference what hour you're there?

A. I have to get there at 1:00 o'clock.

Q. During the day?

A. In the day. Because I asked them to let me come at that hour because if I do not get a seat on the subway, the rumbling of the subway gets my back hurting. It, you know—

Q. Can you climb stairways, ma'm?

A. No, sir.

Q. How did you get up and down to the subways then? How do you go down and come up?

A. I try to find the easiest way out. I pay two fares to see if I get the lowest subway (phonetic). My subway that runs in my area is little nice street. And I've got to go up two escalators and two rows of steps. So I will take an extra bus and go down to Cherry Street and (inaudible) which I walk about 15 (phonetic) flights down and, you know, that's a walk a little way and to go down again (phonetic).

Q. Have you a problem walking downstairs?

A. Downstairs is—and I also have high blood pressure which I take a high blood pressure pill.

Q. How long have you had high blood pressure?

A. As far as I can remember. That's the reason why I only have two children.

Q. Uh-huh. The same doctor treating you with therapy as the one treating your high blood pressure?

A. No, sir.

Q. And is your blood pressure kept under control with the medication?

A. If I take the pill he say, it comes down.

Q. It comes down.

A. But if I get excited, it goes up.

Q. What is the other medicine for?

A. This is Valium for my nerves because I have sleepless nights.

Q. How often do you take Valium?

A. He told me to take one and half a day and—

Q. Uh-huh. Do you find it necessary to take one and a half everyday?

A. I try to skip it because I heard on the TV that Valium is not good, you know, is addicting.

Q. Yes.

A. And I try to skip it as much as I can, but then I get sleepless nights and I get a pain straight through my—my left side of my neck and goes straight down to my foot.

Q. Uh-huh.

A. And Dr. Lowenthal has been giving me some pain killers for—

Q. What is that? What kind of pain pills? What does he call them?

A. I don't know the name of it.

Q. How often do you take these?

HEARING ASSISTANT: Elavil (phonetic).

ALJ: What?

HEARING ASSISTANT: Elavil.

ALF: And what dosage (phonetic)?

HEARING ASSISTANT: 150 milligrams.

BY ALJ:

Q. How often do you take that?

A. He told me I must take it as soon as something happened, but keep on, I have to take one tablet daily (phonetic).

Q. Is that the only pain pill you take?

A. No, I've been through a lot of pain killers.

Q. No, now.

A. Right now I try to—but you see I get Anacin, you know. I take Anacin.

Q. You take Anacin and that?

A. And that. But there were days that when I used to work for the four years that the only thing that could keep me working was about eight Anacin a day.

Q. Are you in pain most of the time now?

A. Yes, sir. I don't know if it's because I'm taking the therapy and I am up and down or—but I'm in pain and it's getting worse.

Q. What does your doctor say now? Does he expect to get you well and back—back in—or are you expected to have to live with this?

A. Well, as I told you before, sir, that Dr. Catill (phonetic) is my surgeon. And he operated on me. And you have in your record that Dr. Stefano (phonetic) has been my medial doctor for the last past 12 years. But when I—They divide you in two. They say, well the accident is Compensation.

Q. Right.

A. And the medical doctor doesn't take care of that.

Q. Uh-huh.

A. So I cannot ask Dr. Stefano anything about this left side because that belongs to Compensation.

Q. Uh-huh.

A. So Dr. Catill told me that I need therapy. And he's been asking for therapy for a long length of time and insurance wouldn't grant the therapy. So finally I got a phone call and they told me that a gentleman wanted to come over to see me. So I worried where did he get my phone number and who is he working for. So he told me he was working for Compensation and he told me that he could help me to get a job and, you know, what for, and I told him, I said, mister, I'd be willing to take a job but I cannot even walk. So he tell me, well, you could come to my office and I try to see—find out who this office—who this office belongs to. And I think it was the Compensation, Rehabilitation. So, anyhow, I went to the office and it end up to be the ICB (phonetic) Rehabilitation Clinic and I was seen by Dr. Lowenthal and he sent me down—he examined me and he sent me downstairs to this young man and he told me I need therapy three times a week.

Q. Well this is what you're doing—

A. And finally now this is what I'm getting. So when I knew I was coming here and I didn't have anyone to represent me, I was looking for a little evidence that I could bring along with me and I asked Dr. Lowenthal if he could give me my last report because he told me that he does report to the Compensation Board. And when he gave me the report and those letters that I show you, this I read and I found out so who he is working for is the insurance company. So I don't know if I was saved by the bell because when I went to—to the hearing in June and in July I was told that, you know, that the insurance lawyer said that he send me to his next doctor, and this next doctor say that I should only be interviewed every two months. And because the New York State doctor, she came upstairs and told the Judge that she already examined me and she would prefer that I continue therapy for three-for three more months.

Q. Uh-huh.

A. So after that I don't know what will become of me, sir.

Q. All right. I believe you have told me about your problems. As I said before, I will evaluate your testimony along with the medical records. We will issue a decision and you

should get that decision, I don't know, within three or four weeks from now. And you'll get a written decision from me.

You have told me just about your medical problem, have you not, as you understand it to be?

A. I think so, sir.

Q. All right.

A. I don't think I forget anything.

Q. All right. All right, we will evaluate your testimony along with your medical, what your doctors have said. And we'll issue a decision and you will get a copy.

A. Okay.

Q. All right, we'll close the hearing at this time.

(The hearing closed at ____, August 22, 1980.)

## CERTIFICATION

I have read the foregoing and hereby certify that it is a true and complete transcription of the testimony recorded at the hearing held in the above case before Administrative Law Judge O. T. Denning.

Deborah A. Clabaugh
DEBORAH A. CLABAUGH
Transcriber

**EXHIBIT AC-1**

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11/10/80

TO WHOM IT MAY CONCERN:

RE: CARMEN CAMPBELL

Mrs. Carmen Campbell has been under my care since November 1978 for lumbar disc disease. She underwent lumbar laminectomy in Januray 1979 for removal of a herniated disc.

Post Op: She is somewhat improved but still complains of lower back pain, numbness in her hip and pins and needles in her feet and toes. She has limitation of lower back movements and mildly restricted straight leg raising. She weighs over 180 pounds.

She is disabled from doing her regular work and should avoid lifting heavy objects and strenuous work.

Very truly yours,

Reza Khatib,
REZA KHATIB, M.D.,P.C.

RK:rc

# Supreme Court of the United States

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**No. 81-1983**

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RICHARD S. SCHWEIKER, SECRETARY OF HEALTH and HUMAN SERVICES,

Petitioner,

v.

CARMEN CAMPBELL

---

ORDER ALLOWING CERTIORARI. Filed June 21, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 378843 1046

# Opposition

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

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No. 81-1983

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

vs.

CARMEN CAMPBELL, RESPONDENT

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

# BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Did the Court of Appeals err in remanding the Social Security disability case of an unrepresented and uneducated claimant, because the Secretary had failed to give the claimant adequate notice and an opportunity to present evidence about her physical and vocational limitations before applying the medical-vocational guidelines?

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IN THE SUPREME COURT OF THE UNITED STATES
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CARMEN CAMPBELL, RESPONDENT

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

# BRIEF FOR RESPONDENT IN OPPOSITION

---

## OPINIONS BELOW

The opinion of the District Court (Petitioner's App. B) is not reported. The opinion of the Court of Appeals for the Second Circuit (Petitioner's App. A) is reported at 665 F.2d 48.

## JURISDICTION

The interlocutory order of the Court of Appeals, which remanded the case to the District Court for further proceedings, was entered on November 30, 1981 (Petitioner's App. E). A petition for rehearing en banc was denied on February 11, 1982 (Petitioner's App. E). The jurisdiction of the court is invoked under 28 U.S.C. §1254(1).

## STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Social Security Act, 42 U.S.C. §§405, 423, and of the regulations involved (20 C.F.R. §404.1545;

20 C.F.R. §404.1510 to 404.1569; and 20 C.F.R. Subpart P, App. 2) are reproduced in the petition (Petitioner's App. F).

## STATEMENT

1. This litigation concerns the eligibility of Carmen Campbell for 23 months of retroactive disability Insurance Benefits ("D.I.B.") under the Social Security Act ("Act"). The Secretary of Health and Human Services ("Secretary") seeks review of an interlocutory order which remanded the case for further proceedings.

Ms. Campbell, a former hotel maid with a 6th grade education, filed a claim for D.I.B. in October, 1979. She was 52 years old, and alleged disability on the basis of a back impairment and hypertension. The claim was denied originally, and upon reconsideration, because the Secretary found "that the claimant retains the capacity to perform her past work as a maid" (R. 6).* Ms. Campbell requested a hearing which was held before an Administrative Law Judge ("ALJ") on August 22, 1980. Ms. Campbell appeared pro se (R. 52-127).

At the hearing, the ALJ did not explain to Ms. Campbell that if he were to find that she was unable to return to her former work he would then have to decide whether she retained the residual functional capacity to perform lighter work. Nor did the ALJ explain

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* References to the record of administrative proceedings, filed with the Court of Appeals, are indicated by "R".

to Ms. Campbell the meaning of job categories, such as "light work", as defined in the regulation (R. 52-127).

Although Ms. Campbell testified at her hearing that because of her back pain and numbness she could not sit, stand, or walk for "too long" and "could not lift", the ALJ did not ask Ms. Campbell to describe with any specificity how many pounds she could lift or how long she could sit, stand or walk (R. 44-45).

On September 26, 1980, the ALJ issued a decision which found that, due to a severe medical impairment, Ms. Campbell could not return to her former occupation as a hotel chambermaid. The ALJ determined that Ms. Campbell retained the capacity for "light work"; was then "closely approaching advanced age"; had a "marginal education" with the ability to communicate in English, which was her second language; and had "unskilled" work experience. On the basis of these findings, the ALJ applied the medical-vocational guidelines (Rule 202.10 in Table 2 of 20 C.F.R., Subpart P, Appendix 2) which directed a conclusion that Ms. Campbell was not disabled (Petitioner's App. F, pp. 20a-29a).

The ALJ's decision became the final decision of the Secretary upon its adoption by the Appeals Council (Petitioner's App. C, pp. 16a-19a). Ms. Campbell then sought judicial review in the United States District Court for the Eastern District of New York.

On April 20, 1981, a status conference in this case was held before the Hon. Mark Costantino, U.S. District Judge. At this conference, Judge Costantino stated,

> My personal opinion is that eventually she is going to be able to prove a disability. There is no question in my mind. But you can't do it with this record. And if I were you, I would start a whole new record with this last letter from the doctor and you are in good shape.

(Transcript of the District Court Status Conference, page 5.*)

On April 29, 1981, the District Court dismissed the complaint (Petitioner's App. B, p. 15a).

2. The Court of Appeals remanded the case to the district court for further proceedings. The Court determined that Ms. Campbell had been deprived of adequate notice of the nature and demands of the types of jobs which she could allegedly perform, and of the opportunity to present evidence about her ability to perform "light work" because "she was not informed of the Secretary's position and the ALJ's findings until she received his decision, when it was too late for her to rebut any finding of available 'light work' jobs."

Rehearing en banc was denied by the Court of Appeals on February 11, 1982 (Petitioner's App. E).

Ms. Campbell, still insured under the Act, filed a second D.I.B. application in February, 1981. After a hearing on this

---

* The transcript of the District Court Status conference of this case was filed with the Court of Appeals.

application, the Secretary determined that Ms. Campbell is in fact not capable of performing either her past relevant work or any other substantial gainful activity (Respondent's App. A, pp. 1a-4a). Part of this case is now moot, as the only issue remaining is Ms. Campbell's entitlement to retroactive benefits.

3. The Social Security Act explicitly provides that in determining whether an individual is disabled, the Secretary must consider not only the individual's medical condition, but also his potential for employment. A claimant is to be adjuged disabled

> if his physical or mental condition is of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy

42 U.S.C. §423(d)(1)(a). The Secretary has promulgated regulations which establish a sequential process for the evaluation of disability. 20 C.F.R. §404.1520 et seq. If the claimant is not engaging in substantial gainful activity, and cannot return to his relevant past occupation due to an impairment which is not so severe as to qualify him for disability on medical considerations alone, the Secretary implements the last stage of the sequential process. The Secretary makes findings of fact with respect to the four factors relevant to the determination of disability, that is, the vocational factors (age, education, and work experience) and the residual functional capacity (the heaviest type of work which the claimant can perform despite his

impairments). Once the Secretary has made these findings about the claimant's characteristics, he looks for a corresponding rule in the tables, or matrix of the four factors, found in 20 C.F.R., Subpart P, Appendix 2 ("grid" or "guidelines"). The rules take administrative notice of the existence of jobs in the economy for an individual who matches the four findings of fact previously made. Where fully applicable, the rules mandate a conclusion of disability or no disability.

## ARGUMENT

### POINT I

### THE DECISION BELOW DOES NOT INVALIDATE THE SECRETARY'S GRID

Contrary to the broad assertions of the Petitioner, the issue in this case is very narrow, and is not worthy of review by this Court. The petitioner Secretary misrepresents the decision below when he suggests that the decision invalidates the Secretary's "medical-vocational" guidelines or grid and therefore raises questions about the whole disability decision-making process. It does no such thing. The decision merely clarifies one aspect of the application of the guidelines already in place in the Secretary's own regulations: it simply restates the requirement that claimants must be informed of every finding of the Secretary that is used in the application of the grid so that the claimant will have a meaningful opportunity to rebut those findings.

In order to use the grid to determine the outcome of a particular case, an ALJ must determine the claimant's age, work experience, educational level, and residual functional capacity, i.e., the level of work that the claimant can perform despite his impairments. This last criterion is framed in terms of four job categories requiring different exertional capacities. Before applying the grid, the Secretary must determine whether the claimant's maximum sustained work capability is limited to sedentary, light, medium, or heavy work. Each of these categories is precisely defined in the regulations. For example, to be found able to perform light work, an individual must be able to

> lift 20 pounds maximum with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be only a negligible amount, a job is in this category when it requires walking or standing to a significant degree, or when it involves sitting most of the time with a degree of pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, an individual must be capable of performing substantially all the foregoing activities.

20 C.F.R. §404.1510(c).

The regulations embody the Secretary's administrative notice of jobs existing in the national economy which can be performed by individuals with capabilities in each of the four work categories. 20 C.F.R., Subpart P, Appendix 2 §200.00(b).

The Secretary's own regulations already contain the requirement that the Secretary afford the disability claimant the opportunity

to rebut all the findings of fact which form the basis for the application of the guidelines:

> Where the findings of fact made with respect to a particular individual's vocational factors and residual capacity coincide with all the criteria of a particular rule, the rule will direct a conclusion as to whether the individual is disabled. However, each of these findings of fact is subject to rebuttal and the individual may present evidence to refute such findings.

20 C.F.R. Subpart P, Appendix 2 §200.00(a). (emphasis added). The decision below merely reiterates this requirement.

In a case such as this, where the claimant has established her inability to resume her former work, the claimant's ability to perform alternative work becomes determinative. The ALJ must give the claimant a meaningful opportunity to explain why she cannot do lighter types of work, if this is the case. Here, the ALJ failed to explain to Ms. Campbell that her levels of tolerance for exertional activities were relevant and that she could (and should) present testimonial and other evidence on the precise issues of her ability to lift ten pounds, sit for certain hours, and the like. Thus, Ms. Campbell was effectively deprived of the opportunity to refute the finding that she could do "light work" because the ALJ never told her what "light work" means, either in terms of her alleged exertional capacity, or in terms of the jobs that she could allegedly perform. This error was especially prejudicial to Ms. Campbell because neither the initial decision, nor the decision after reconsideration mentioned as a reason

for denying benefits that Ms. Campbell could perform "light" work. She thus had no notice of the decisive issue at her hearing.

It was this error, the ALJ's failure to give notice of the job categories or types of jobs for which he found that the claimant had the residual capacity, on which the Court of Appeals focussed its attention:

> Our major concern is that the claimant be given adequate notice of the nature and demands of the types of jobs allegedly available. Absent sufficient notice, the claimant is deprived of any real chance to present evidence showing that she cannot in fact perform the types of jobs that are administratively noticed by the guidelines.

The Court is only making the Secretary's own regulation practicable. Unless the Secretary explains to the claimant, at the hearing, the elements relevant to the determination of residual functional capacity, i.e., the nature and demands of the jobs in the category for which the claimant may retain the physical capacity, the Secretary's own regulation, which requires an opportunity to refute this finding, will be empty of meaning. The right to rebut necessarily implies knowledge of the facts subject to rebuttal.

All the decision requires is that the ALJ give some examples of jobs included in the relevant work category. This listing of jobs is not suggested as an evidentiary requirement necessarily applicable to each case, but merely as a meaningful way of informing uneducated, pro se claimants of the definition of job categories. The recitation

of jobs is meant only as an explanation of the critical factor of residual capacity, that is, the heaviest category of work which the claimant can perform. By admonishing the Secretary to give examples of specific jobs in the categories, the court is merely proposing a "notice . . . of such nature as reasonable to convey the required information." Mullane Central v. Hanover, 339 U.S. 306, 314 (1980).

Contrary to the Secretary's assertion, the Court of Appeals in no way requires him to produce vocational experts at disability hearings. As the court stated in Decker v. Harris, 647 F.2d 294, 298 (2d Cir. 1981):

> if the Secretary chooses to proceed without expert testimony by taking administrative notice, the Secretary must provide a similar degree of specificity to achieve the underlying objective of procedural fairness. . .

The decision does not require the ALJ to prove that a particular claimant is able to do a particular job, but merely to give any examples of jobs in the category as a way of ensuring that the claimant understands what the category means. It is clear that the Court of Appeals conceived the recital of job examples as a simple procedural measure:

> If there are so many types of jobs available it would not be too great a burden for the Secretary or the ALJ to specify a few alternative available types of jobs so that the claimant is given an opportunity to show that she is incapable of performing those jobs. Moreover, we stress that the jobs should be specified at the hearing so that a claimant has a chance to put evidence into the record on that issue.

The Secretary admits the need for notice of the requirements of the job categories. However, he asserts that "a claimant does have explicit notice of the relevant requirements" because those requirements are defined in the regulations (Petitioner's brief at 15). The proposition that pro se claimants have explicit notice of technically defined requirements because they are buried somewhere in the 320 pages of regulations which govern the disability process is simply preposterous.

Moreover, the Secretary's own regulations, 20 C.F.R. §404.944, impose upon the ALJ the duty to ask all questions relevant to presentation of the case. Particularly when the claimant is unrepresented, the ALJ must insure that a full and fair record is developed. E.g., Cowart v. Schweiker, 662 F.2d 731 (11th Cir. 1981). This duty to develop a full record means that the ALJ cannot leave the claimant adrift with complicated regulations, but must elicit all the testimony concerning the vocational and physical capacities relevant to the application of the grid.

If any general rule can be inferred from the decision at issue here, it is that the Secretary must comply with his own requirement that claimant be given meaningful notice of all the factors that are relevant in applying the grid. Clearly this decision raises no important or novel question of federal law, and will not disrupt the process of adjudicating disability claims.

## POINT II

## THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEALS

Petitioner erroneously asserts that the decision of the Court of Appeals invalidates the grid regulations and that, therefore, it is in conflict with every other circuit which has considered the issue. This is not true. The decision below does not, either explicitly or implicitly, invalidate the grid; it is consistent with the decisions cited by the Secretary in approving proper use of the grid. It differs from these decisions only in that it addresses an issue not confronted in these other cases, namely the type of notice and opportunity to present evidence which the Secretary's own regulations require.

In all the cases cited by the Secretary, the central issue was whether the grid was a valid decision-making tool even though it dispensed with the need for individualized proof that a specific claimant could perform a specific job. As in Campbell, the courts upheld the grid, finding individual proof unnecessary. The need for such proof is not the issue here; rather the issue is notice: what the ALJ must do to adequately inform the claimant of the determinations to be made before the grid is applied.

In his petition, the Secretary quotes at length from Santise v. Schweiker, Nos. 81-1904, et al. (3rd Cir. April 8, 1982) (slip op. 24)

although this case did not address at all the notice issue. Santise considered whether the Secretary was required to prove, through vocational testimony, the existence of specific jobs suitable for a claimant of certain characteristics. The court in Santise assumed, without discussion, that the determination about the claimant's factors or characteristics were proper, and thus the court did not discuss the type of notice about those characteristics, and the opportunity to present evidence and to rebut the findings concerning those characteristics, which the Secretary must give the claimants. The holding of Santise, that the Secretary may take administrative notice of the existence of jobs for a claimant of certain, determined characteristics, is fully compatible with the holding of Campbell.

Although the notice issue was not expressly considered in Kirk, et al. v. Secretary, 667 F.2d 524 (6th Cir. 1981), the decision is instructive. The court affirmed the use of the grid expressly because in its implementation

> [e]ach appellant was given the opportunity to challenge the four factual findings that make up the grid - age, work experience, physical ability and education. Only the conclusion of the existence of . . . work is mandated. The guidelines specifically require every characteristic to be fully satisfied . . . Appellants here cannot be said to complain of the opportunity to present evidence . . .

667 F.2d at 534. This statement clearly suggests that the Sixth Circuit, like the Second, was concerned that use of the grid did not deprive claimants of notice of the issues or an opportunity to

present all the relevant evidence.

In like fashion, the First Circuit conditioned its approval of the grid on a context in which the claimant had the opportunity to present all his evidence. In Geoffrey v. Secretary of H.H.S., 663 F.2d 315 (1st Cir. 1981) the court held that the Secretary could take administrative notice of jobs, subject to the provisions of 5 U.S.C. §558(e). The court did not address specifically the issue of notice, but it stated,

> the facts on which the Secretary premised the taking of notice are "subject to rebuttal" and "other evidence to refute such findings." (citation omitted). Geoffrey, who was assisted by counsel at the administrative hearing, does not complain that he has been precluded from presenting all the medical evidence he has in his favor. Therefore, we think the procedure is reasonable. It balances the Secretary's legitimate interest . . . with a claimant's right to an opportunity to present his case (citation omitted).

663 F.2d at 318.

In Frady v. Harris, 646 F.2d 143, 154 n.4 (4th Cir. 1981), the court upheld the use of the grid, specifically noting that the claimant did not argue "that the notice by the ALJ of an intention to rely on administrative notice was insufficient".

In Torres v. Secretary, No. 81-1606 (1st Cir. May 3, 1982) (slip op.) the First Circuit considered whether the Secretary may use the grid "to disqualify categories of applicants who have certain relevant characteristics" (slip op. pp. 1-2) (emphasis supplied).

As in Campbell, the court held that the Secretary may use the grid.

The First Circuit's perception of an apparent conflict between its decision and that in Campbell is based on a misunderstanding of the Campbell decision. Instead of taking the listing of specific jobs for what it is, a way of explaining the job categories so that the claimant may present evidence about his capacities to perform the activities encompassed in these categories, the Torres Court understood the listing of jobs as necessary to give the claimant a chance to rebut the existence of those jobs. There is no real conflict between these two cases. In fact, Torres emphasizes the precise holding of Campbell, namely that in applying the grid, the Secretary must "conduct an inquiry into the many issues of adjudicative facts raised by each claimant's application. The AJL must analyse each claimants' exertional capacity, age, work experience and education." Torres, supra, slip op. at 5.

This concern with the claimants' opportunity to present evidence of the four factors which make up grid is a common element of all the decision about the guidelines. The Second Circuit was just echoing this concern when it held that where the Secretary applies the grid he must give claimants notice and a meaningful opportunity to present evidence, particularly with respect to the critical factor of capacity of job category.

The conflict asserted by the petitioner does not exist; Campbell is in perfect agreement with the other circuits' decisions about the grid.

## POINT III

### THIS CASE IS PROCEDURALLY INAPPROPRIATE FOR CERTIORARI

The procedural status of this case makes certiorari particularly inappropriate. First, as a result of a subsequent application by Ms. Campbell, the case is moot except for respondent's right to 23 months of back benefits. Second, the decision of the Court of Appeals is only an interlocutory order remanding the case for further proceedings, and therefore this case is not ripe for review.

Ms. Campbell filed a new application for D.I.B. on February 9, 1981. The application was denied initially and upon reconsideration, and Ms. Campbell requested a hearing. The hearing was held before an ALJ on March 17, 1982. Due to the pendency of the instant proceeding, Ms. Campbell agreed, at her hearing, to change the date of onset of disability alleged in her application to January 1, 1981. On April 28, 1982, the ALJ issued a decision finding that since at least January 1, 1981 Ms. Campbell is not only unable to perform her past work but incapable of performing any substantial gainful activity (App. A, attached hereto).

This decision has partially mooted this case. The only issue now before the court is Ms. Campbell's entitlement to retroactive D.I.B. from the onset date alleged on her first application, December 1,

1979 to the date of entitlement on the subsequent one.

The Court of Appeals' order which the Secretary would have this court review, is an interlocutory, nonfinal order which remanded the case to the district court for further proceedings (Petitioner's App. E). This lack of finality is of itself sufficient ground for denial of the petition. See, Youngstown Co. v. Sawyer, 343 U.S. 579, 584 (1952); Hamilton Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251, 258 (1915). In the absence of some exceptional reason, this court should not grant certiorari to review a nonfinal judgment, such as one remanding the case to the district court. See, American Construction Co. v. Jacksonville T. & K.R. Co., 148 U.S. 372, 384 (1892).

This case does not raise any issue of importance which would justify abandoning the practice of denying certiorari of non-final judgments.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN C. GRAY, JR., ESQ.
RUBEN NAZARIO, Of Counsel
JANE GREENGOLD STEVENS, Of Counsel
BROOKLYN LEGAL SERVICES CORP. B
105 Court Street
Brooklyn, New York 11201
(212) 855-8003

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132 West 43rd Street
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Attorneys for Respondent

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

Name and Address of Claimant:
* Carmen Campbell

79 Lorraine Street
Brooklyn, New York 11231

## NOTICE OF FAVORABLE DECISION
## PLEASE READ CAREFULLY

The enclosed decision is favorable to you, either wholly or partly. If you are satisfied with the decision, there is no need for you to do anything at the present time. Further action on the decision will proceed automatically.

If you disagree with the decision, you have the right to request the Appeals Council to review it within 60 days from the date of receipt of the notice of this decision. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local social security office or at the hearing office, or you may write or telephone these offices indicating your intent to request review. You may also submit a written request for review directly to the Appeals Council, Office of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

The Appeals Council may, on its own motion, within 60 days from the date shown below, review the decision, which could possibly result in a change in the decision. (20 CFR 404.969 and 416.1469). After the 60 day period, the Appeals Council generally may only reopen and revise the decision on the basis of new and material evidence, or if a clerical error has been made as to the amount of the benefits or where there is an error as to the decision on the face of the evidence on which it is based. (20 CFR 404.988 and 416.1488; 42 CFR 405.750 and 405.1570). If the Appeals Council decides to review the enclosed decision on its own motion or to reopen and revise it, you will be notified accordingly.

Unless you timely request review by the Appeals Council or the Council reviews the decision on its own initiative, you may not obtain a court review of your case (section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act).

This notice and enclosed copy of
decision mailed

~~April 28, 1983~~

cc:
Name and Address of Representative:

* Ruben Nazario
105 Court Street
Brooklyn, New York 11201

HA-L502-U6 (10/80) (Formerly HA-502)
DESTROY OLD STOCK

REPRESENTATIVE

DEPARTMENT OF
**HEALTH AND HUMAN SERVICES**
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

## DECISION

| In the case of | Claim for Period of Disability and Disability Insurance Benefits |
|---|---|
| Carmen Campbell (Claimant) | |
| (Wage Earner) (Leave blank if same as above) | 093-40-3689 (Social Security Number) |

This case is before me upon a timely request for hearing filed by the claimant, who is dissatisfied with the determination disallowing an application for a period of disability and for disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act (42 U.S.C. 416(i) and 423).

In view of my conclusion, which is wholly favorable to the claimant, recitation of the evidence is unnecessary.

After careful consideration of all the evidence of record, I find that the disability earnings requirements are met; and that beginning on 1-1-81, the claimant was under a "disability" as that term is defined in the Social Security Act, and that such disability has continued up to and through the date of this decision.

It is the decision of the undersigned that the claimant, based on the application filed on 2-9-81, is entitled to a period of disability, commencing on 1-1-81 and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

Claimant stipulates to an onset date of January 1, 1981 on the current application.

Date: April 28, 1982

I. Bradford Spielman
Administrative Law Judge

REPRESENTATIVE

# LIST OF EXHIBITS

CARMEN CAMPBELL (Claimant)

093-40-3689 (Social Security Number)

(Wage Earner) (Leave blank in Title XVI Cases or if name is same as above)

| EXHIBIT NO. | DESCRIPTION | NO. OF PAGES |
|---|---|---|
| 1 | Application for Disability Insurance Benefits, dtd 2/9/81 | 4 |
| 2 | Disability Determination and Transmittal, dtd 3/16/81 | 2 |
| 3 | Request for Reconsideration, dtd 4/28/81 | 1 |
| 4 | Disability Determination and Transmittal, dtd 8/21/81 | 3 |
| 5 | Social Security Notice of Reconsideration, dtd 8/26/81 | 3 |
| 6 | Request for Hearing, dtd 10/13/81 | 1 |
| 7 | Earnings Record, dtd 2/11/81 | 1 |
| 8 | Vocational Report, dtd 3/14/81 | 6 |
| 9 | Disability Report, dtd 2/9/81 | 8 |
| 10 | Reconsideration Disability Report, dtd 4/28/81 | 6 |
| 11 | Claimant's Statement when request for Hearing, dtd 10/13/81 | 1 |
| 12 | Workers' Compensation Board, dtd 5/73 | 1 |
| 13 | Medical Report from Ashok Khanna, M.D. dtd 4/81 | 9 |
| 14 | Medical Records from Long Island College Hospital, dtd 6/9/81 | 2 |
| 15 | Medical Report from Milton Lowenthal, M.D. dtd 2/25/81 | 3 |
| 16 | Consultative examination report from Samir K. Dutta, M.D. dtd 3/4/81 | 5 |
| 17 | Statement of Residual Functional Capacity, dtd 3/17/81 | 1 |
| 18 | Medical Records from Mobile Health Care, dtd 5/29/81 | 9 |
| 19 | Medical Report from Robert Lazarus, M.D. dtd 7/20/81 | 3 |



ATTACH TO REPRESENTATIVE'S COPY OF THE DECISION

## LIST OF EXHIBITS

Carmen Campbell (Claimant) | 093-40-3689 (Social Security Number)

(Wage Earner) (Leave blank in Title XVI Cases or if name is same as above)

| EXHIBIT NO. | DESCRIPTION | NO. OF PAGES |
|---|---|---|
| 20 | Medical Report from Milton Lowenthal, M.D., dated 8/14/80 | 3 |
| 21 | Medical Report from Reza Khatib, M.D., dated 11/10/80 | 1 |
| 22 | Medical Report from Haydn Briggs, M.D., dated 2/11/82 | 3 |
| 23 | Medical Report from Reza Khatib, M.D., dated 3/15/82 | 3 |
| 24 | Medical Report from Union Family Medical Fund of the Hotel Industry of New York City, dated 2/25/82 | 10 |

SUPREME COURT OF THE UNITED STATES

---

RICHARD S. SCHWEIKER, Secretary of the Department of Health and Human Services,

Petitioner,

vs.

CARMEN CAMPBELL,

Respondent.

---

No. 81-1983

AFFIDAVIT OF SERVICE

STATE OF NEW YORK )
: ss.:
COUNTY OF KINGS )

I, RUBEN NAZARIO, being duly sworn, depose and say that I am not a party to the action, I am over 18 years of age and I am employed by Brooklyn Legal Services Corporation B, 105 Court Street, Brooklyn, New York 11201.

That on the 27th day of May, 1982, I served the within APPEARANCE FORM, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, and BRIEF IN OPPOSITION TO THE PETITION on each addressee listed below, being the address designated by said addressee for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper, in a depository under the exclusive care and custody of the United States Postal Service, addressed to:

Office of the U.S. Solicitor General
Department of Justice, Room 5614
Pennsylvania Avenue at 10th Street
Washington, D.C. 20530

Attention: John H. Garvey
Assistant to the Solicitor General

RUBEN NAZARIO

Sworn to before me this
27th day of May, 1982

Carmen I. Velez
NOTARY PUBLIC

CARMEN I. VELEZ
Notary Public, State of New York
No. 24-4750036
Qualified in Kings County
Commission Expires March 30, 1983

RECEIVED
MAY 28 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

---

RICHARD S. SCHWEIKER, Secretary of the Department of Health and Human Services,

Petitioner,

vs.

CARMEN CAMPBELL,

Respondent.

---

No. 81-1983

JUN 17 PAGE

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, motion is hereby made that respondent be allowed to proceed in forma pauperis. Respondent's affidavit is attached to this motion as Exhibit A. Leave to proceed in forma pauperis was sought and obtained in the United States District Court for the Eastern District of New York. A copy of the district court order granting respondent permission to proceed in forma pauperis is attached hereto as Exhibit B.

DATED: May 25, 1982
Brooklyn, New York

Yours, etc.,

JOHN C. GRAY, JR., ESQ.
RUBEN NAZARIO, Of Counsel
BROOKLYN LEGAL SERVICES CORP. B
105 Court Street
Brooklyn, New York 11201
(212) 855-8063

Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

---

RICHARD S. SCHWEIKER, Secretary of Health and Human Services,

Petitioner,

vs.

CARMEN CAMPBELL.

---

No. 81-1983

Affidavit of CARMEN CAMPBELL in Support of her Motion to Proceed in Forma Pauperis.

STATE OF NEW YORK )
: ss.:
COUNTY OF KINGS )

I, CARMEN CAMPBELL, being duly sworn according to law, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed herein without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or give security therefor, and that I believe I am entitled to redress.

I further swear that the responses to the questions relating to my ability to pay, attached hereto, are true.

Carmen Campbell
CARMEN CAMPBELL

Subscribed and Sworn to before me
this 5th day of May, 1982

Carmen I. Vrlez
NOTARY PUBLIC

CARMEN I. VRLEZ
Notary Public, State of New York
No. 24-4750026
Qualified in Kings County
Commission Expires March 30, 1983

EXHIBIT A, P.1

1. Are you now employed [ ]Yes [X]No [ ] Am self-employed.

2. Name and address of employer: N/A

3. IF YES, how much do you earn per month $ N/A

IF NO, give month and year of last employment.

4. If married is your Spouse employed? [ ]Yes [ ]No.

5. IF YES, how much does your Spouse earn per month $

IF a minor under age 21, what is your parents or guardians approximate income $

6. Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the forms of rent payments, interest, dividends, retirement or annuity payments, or other sources? Yes [X] No [ ]

IF YES, GIVE THE AMOUNT RECEIVED & IDENTIFY SOURCES

| received | source |
|---|---|
| $178.00 | monthly Workmen's Compensation |

7. Have you any cash on hand or money in saving or checking account [X]Yes [X]No.
IF YES, state total amount $ 530.00.

8. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishing and clothing)? [ ] Yes [X] No.

IF YES, give value and describe it.

| value | sources |
|---|---|
| $ | |

9. Marital status

[ ] single
[ ] married
[ ] widowed
[X] separate or divorced

Total number dependents:

List person you suppor and relationship to th

10.

| Apartment or Home: | Creditors | total debt | payments monthly |
|---|---|---|---|
| | Housing Authority | $ | $ |
| | | $ | $ |
| | | $ | $ |
| | | $ | $ |

SIGNATURE OF DEFENDANT (or person represented)

I hereby certify the above to be correct

Catherine Campbell

WARNING: A FALSE OR DISHONEST ANSWER TO A QUESTION IN THIS AFFIDAVIT MAY BE PUNISHABLE BY FINE OR IMPRISONMENT OR BOTH

U.S. DISTRICT COURT E.D.N.Y.

★ JAN 19 1981 ★

TIME A.M.
P.M.

Mrs. CARMEN CAMPBELL

vs.

SECRETARY, Department of Health and Human Services

No. _____

CV-81-0155
COSTANTINO, J.

AFFIDAVIT OF CARMEN CAMPBELL

STATE of NEW YORK
COUNTY of K.ings } ss:

I, the above-named affiant, being duly sworn according to law depose and say that I am the Plaintiff in the above-entitled proceeding; that I am a citizen of the United States; that I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the nature of my action is briefly stated as follows:

Social Security Disability Benefits.

X Carmen Campbell

Sworn to and subscribed before me this 17 day of January, 1981.

[illegible]

[illegible]
Notary Public, State of New York
No. 41-[illegible]
Qualified in Kings County
Cert. filed in Kings County
Commission Expires March 30, 1981

ORDER OF COURT

It is Ordered that the Plaintiff in the above-entitled proceeding be and he hereby is permitted to prosecute said proceeding to conclusion without prepayment of fees or costs or security therefor.

Charles P. Sifton
District Judge.

Dated: Jan. 15, 1981

EXHIBIT B, P.1 #1

YES, how much do you earn per month $_____ IF NO, give month employment N/A

IF married is your Spouse employed? ( )Yes ( )No N/A

IF YES, how much does your Spouse earn per month $_____ N/A

IF a minor under age 21, what is your parents or guardians approximate income $_____

Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the forms of rent payments, interest, dividends, retirement or annuity payments, or other sources?

Yes( ) No(X)

Workman's Comp. - $196 every month (will be reduced to $182 + [illegible] mo.)

| | Received | Sources |
|---|---|---|
| IF YES, GIVE THE AMOUNT RECEIVED & IDENTIFY SOURCES | $_____ | _____ |
| | $_____ | _____ |

Have you any cash on hand or money in saving or checking account? Yes( ) (No)
IF YES, state total amount $_____.

Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishing and clothing)?

Yes( ) (No)

| | Value | Sources |
|---|---|---|
| IF YES, give value and describe it. | $_____ | _____ |
| | $_____ | _____ |
| | $_____ | _____ |

Marital status

_____ Single
_____ Married
_____ Widowed
__✓__ Separated or Divorced

Total number dependents: 1

List person you support and relationship to them: SELF

| Department Store: | Creditors | Total Debt | Monthly Payments |
|---|---|---|---|
| | _____ | $_____ | $_____ |
| | _____ | $_____ | $_____ |
| | _____ | $_____ | $_____ |
| | _____ | $_____ | $_____ |

I hereby certify the above to be correct

SIGNATURE OF DEFENDANT (or person represented) X Warren Campbell

WARNING: A FALSE OR DISHONEST ANSWER TO A QUESTION ON THIS AFFIDAVIT MAY BE PUNISHABLE BY FINE OR IMPRISONMENT, OR BOTH.

EXHIBIT B, P.2

# Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
JUN 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1983

# In the Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

*v.*

CARMEN CAMPBELL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

**TABLE OF AUTHORITIES**

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*Santise* v. *Schweiker*, Nos. 81-1904 *et al.* (3d Cir. Apr. 8, 1982) ..... 4

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

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No. 81-1983

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

*v.*

CARMEN CAMPBELL

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## REPLY BRIEF FOR THE PETITIONER

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1. Respondent argues (Br. in Opp. 6-11) that the Second Circuit's decision in this case does not invalidate the medical-vocational regulations, 20 C.F.R. Part 404, Subpart P, as a basis for making disability determinations. As we show below, this assertion is incorrect. Moreover, decisions by the First and the Eleventh Circuits since the filing of the petition both demonstrate the inaccuracy of respondent's assertion and compound the conflict among the circuits regarding the validity of the regulations.

In *Torres* v. *Secretary of HHS*, No. 81-1606 (1st Cir. May 3, 1982), the First Circuit reaffirmed its earlier support for the validity of disability decisions based on the regulations. See *Rodriguez* v. *Secretary of HHS*, No. 81-1610 (1st Cir. Apr. 2, 1982); *Geoffroy* v. *Secretary of HHS*, 663 F. 2d 315, 318-319 (1st Cir. 1981). In *Torres*, the court held

that "[w]here the Medical-Vocational Guidelines purport to require a finding of 'not disabled', the ALJ need not name specific jobs that the claimant could perform." Slip op. 4. The court went on to say (*ibid.*): "We recognize that our holding here is contrary to that of the Second Circuit. *Decker* v. *Harris*, 647 F. 2d 291 (2d Cir., 1981); *Campbell* v. *Secretary of HHS*, No. 81-6108, slip op. (2d Cir., Nov. 30, 1981)."

In *Broz* v. *Schweiker*, Nos. 81-7140 *et al.* (11th Cir. June 7, 1982), the Eleventh Circuit held that "the regulations as they have been applied are invalid because they conclusively determine the effect of age on disability * * *." Slip op. 1484. On the other hand, the court upheld the regulations in other respects and explicitly stated its disagreement with the Second Circuit about the Secretary's authority to take administrative notice of the existence of work in the national economy for persons described in the guidelines. *Id.* at 1491-1492 & n.12.

2. Respondent mistakenly contends that the court of appeals' decision in this case does not invalidate the medical-vocational guidelines. Rather, she argues, the court's requirement that the Secretary give specific examples of the nature and demands of jobs that exist in the national economy is intended simply "as an explanation of the critical factor of residual capacity" for "uneducated, *pro se* claimants" (Br. in Opp. 9-10). Moreover, she asserts, "the Court of Appeals in no way requires [the Secretary] to produce vocational experts at disability hearings" (*id.* at 10). These contentions are not supported by the decision below.

a. The court of appeals' opinion belies any notion that the court intended simply to give pro se claimants "an explanation of * * * residual capacity." Before it proceeded to hold the regulations invalid, the court itself stated that

that was not an issue before it: "The record as a whole supports the ALJ's finding that Ms. Campbell had the 'residual functional capacity' to perform 'light work' " (Pet. App. 7a). The court then added, quoting its earlier decision in *Decker* v. *Harris*, 647 F. 2d 291, 298 (2d Cir. 1981), that " '[t]he key consideration * * * must be that the claimant be given adequate opportunity *to challenge the suitability or availability of the jobs noticed*' " (Pet. App. 10a) (emphasis added). The very purpose of the regulations, however, is to eliminate those issues from disability adjudications in cases where the claimant's relevant medical and vocational characteristics are accurately described in the guidelines. The prior practice of relying on the judgments of administrative law judges and the testimony of vocational experts in each case produced inconsistency in the adjudication of hundreds of thousands of claims for disability benefits each year. The Second Circuit's decision unquestionably reinstates that practice.[1]

b. The court of appeals did not expressly hold that in future disability hearings vocational experts will be required to testify about the existence of specific jobs that the claimant can perform. The court recognized, however, that the demands it was making on the adjudicatory system had "[i]n the past, * * * been [satisfied] largely through the use of vocational testimony to establish that there are specific jobs suitable to the claimant's capabilities" (Pet. App. 9a), and it gave no reason to believe that the task could be

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[1] Respondent asserts (Br. in Opp. 11) that the requirement of notice of specific jobs existing in the national economy merely implements the Secretary's own regulation, 20 C.F.R. 404.944, which requires the administrative law judge to "look[] fully into the issues." That regulation is nowhere mentioned by the court of appeals, and of course it does not apply to issues already determined by rulemaking and not open to adjudication.

performed differently in the future. The First Circuit in *Torres* v. *Secretary of HHS, supra*, slip op. 4, realized that "[i]f we were to require an ALJ to name particular jobs in such cases, we would force him to rely upon a vocational expert's testimony * * *." The Third and Eleventh Circuits have understood the decision in *Campbell* to have precisely the same effect. *Santise* v. *Schweiker*, Nos. 81-1904 *et al.* (3d Cir. Apr. 8, 1982), slip op. 26-27 & n.25; *Broz* v. *Schweiker, supra*, slip op. 1491 & n.12. Indeed, the Second Circuit itself, subsequent to *Campbell*, has interpreted its rule in the same way. In *Noel* v. *Schweiker*, Nos. 81-6156 *et al.* (2d Cir. Feb. 22, 1982) (unpublished), the court stated: "This circuit recently examined the conflict between [the medical-vocational] guidelines and prior case law and resolved that conflict adversely to the Secretary in *Campbell* v. *Secretary of HHS*" (slip op. 1-2). After reviewing the evidence at the administrative hearings, the court remanded for further proceedings, stating (slip op. 5) (emphasis added):

> At none of the above hearings was there any *testimony* indicating the specific jobs that were suitable to the respective claimants' capabilities. It follows, therefore, that contrary to *Campbell, supra*, claimants were not given a chance to rebut any finding by the Secretary of suitable available alternative jobs.[2]

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[2]The record in *Noel* contradicts respondent's suggestion that the Second Circuit's decision in *Campbell* was a mere procedural device intended to assist "uneducated, *pro se* claimants" (Br. in Opp. 9). Two of the three claimants in *Noel* and its consolidated cases were represented by counsel at the hearing before the administrative law judge. *Noel* v. *Schweiker*, No. 81-6156 (2d Cir. Feb. 22, 1982), R. 26; *Mack* v. *Schweiker*, No. 81-6166 (2d Cir. Feb. 22, 1982), R. 41. See also *Peryea* v. *Schweiker*, No. 81-6158 (2d Cir. Feb. 22, 1982), R. 37. ("R." refers to the administrative record in each case, filed with the court of appeals.)

On the panel in *Noel* were Chief Judge Feinberg, the author of the opinion in *Decker* v. *Harris, supra*, 647 F. 2d at 292, and Judge

3. Respondent also argues that notice of specific jobs underlying the published guidelines in Appendix 2, 20 C.F.R. Part 404, Subpart P, would have cured the prejudice she allegedly suffered before the administrative law judge, since she "had no notice of the decisive issue at her hearing" (Br. in Opp. 9). This contention is also without merit. The administrative law judge began the hearing by stating (R. 25):

> I will be taking evidence as to the severity and expected duration of your impairments, * * * and whether you have the residual capacity to perform other types of work taking into account your age, education and work history. There is a lot of instances that we can take in evidence on your residual functional capacity to engage in sedentary, light, medium, or heavy work. This essentially, what we're taking into account, your ability to walk, stand, sit, lift, push, pull or carry.
>
> I will take evidence and consider any mental, skin, sensory or environmental impairment that might limit your capacity to work.

Respondent testified to the circumstances of her injury (R. 41-42), the nature of her treatment (R. 43-51), and her efforts to work following her injury and operation (R. 38-40). She also introduced six exhibits bearing on the classification of her residual functional capacity, including a physical capacities evaluation form completed by her doctor which stated that respondent could not lift the weight necessary for performance of light work (R. 114). The administrative law judge's conclusion that other evidence supported her ability to do light work (Pet. App.

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Lumbard, who joined the opinion in *Campbell*. We have provided counsel for respondent with a copy of the *Noel* opinion and have lodged a copy with the Clerk of this Court.

23a-27a) was, however, upheld by the appeals council (*id.* at 17a-18a), the district court (*id.* at 14a), and the court of appeals (*id.* at 7a).

4. Contrary to respondent's assertion, review of the court of appeals' decision remanding this case to the agency is appropriate given the clear conflict in the circuits, the obvious importance of the regulations to the operation of the disability program, and the finality of the Second Circuit's determination that the regulations are invalid. *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Richardson* v. *Perales*, 402 U.S. 389, 398 (1971); *United States* v. *General Motors Corp.*, 323 U.S. 373, 374 (1945). No further factual development is necessary for a proper presentation of the important legal issue presented, and a decision by this Court reversing the judgment of the court of appeals will terminate this litigation.[3]

For the foregoing reasons and those presented in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
*Solicitor General*

JUNE 1982

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[3]Respondent's suggestion that this case is "partially mooted" (Br. in Opp. 16) is completely lacking in substance. The original administrative decision that led to this litigation was limited to respondent's entitlement to benefits as of that date. The subsequent administrative decision of April 28, 1982, finding respondent disabled on the basis of a change in her condition, had no effect on her right to benefits through December 31, 1980 (see Pet. App. 16a). See 42 U.S.C. 405(h); 20 C.F.R. 404.957(c)(1); *Califano* v. *Sanders*, 430 U.S. 99 (1977).

# Petitioner's Brief

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No. 81-1983

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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RICHARD S. SCHWEIKER, SECRETARY OF HEALTH and HUMAN SERVICES, PETITIONER

*v.*

CARMEN CAMPBELL

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE PETITIONER

---

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## QUESTION PRESENTED

Whether the Secretary of Health and Human Services in appropriate cases may rely upon published medical-vocational guidelines, rather than testimony of vocational experts, to determine the existence of substantial gainful work in the national economy for disability claimants under the Social Security Act.

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 81-1983

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH and HUMAN SERVICES, PETITIONER

*v.*

CARMEN CAMPBELL

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 665 F.2d 48. The opinion of the district court (Pet. App. 12a-14a) is unreported. The decisions of the Social Security Administration Appeals Council (Pet. App. 16a-19a) and the Administrative Law Judge (Pet. App. 20a-29a) are unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on November 30, 1981. A petition for rehearing was denied on February 11, 1982 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on April 26, 1982, and was

granted on June 21, 1982 (J.A. 56). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Sections 205(a) and 223(d) of the Social Security Act, 42 U.S.C. 405(a) and 42 U.S.C. (& Supp. IV) 423(d); 20 C.F.R. 404.1545; 20 C.F.R. 404.1560 to 404.1569; and 20 C.F.R. Part 404, Subpart P, App. 2, are set forth in Pet. App. 34a-75a.

## STATEMENT

1. Titles II and XVI of the Social Security Act provide disability benefits to individuals who, because of a physical or mental impairment, are unable to do their previous work or to "engage in any * * * kind of substantial gainful work which exists in the national economy * * *." 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).[1] In determining whether a claimant is disabled, the Act requires the Secretary of Health and Human Services to consider, in addition to a claimant's physical and mental impairments, the vocational factors of age, education, and work experience. *Ibid.* In 1978, after years of study and

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[1] The Act's definition of disability is the same for both the Federal Old-Age, Survivors, and Disability Insurance program (Title II) and the Supplemental Security Income ("SSI") program (Title XVI). Compare Section 223(d) of Title II, 42 U.S.C. (& Supp. IV) 423(d), with Section 1614(a)(3) of Title XVI, 42 U.S.C. (& Supp. IV) 1382c(a)(3). The medical-vocational regulations apply to disability determinations under both programs: 20 C.F.R. Part 404, Subpart P governs Title II Claims; 20 C.F.R. Part 416, Subpart I, which is virtually identical to Subpart P, applies to SSI claims. 20 C.F.R. 416.969. Respondent claimed benefits only under Title II.

consultation with Congress, and after giving interested parties notice and an opportunity for comment,[2] the Secretary promulgated regulations governing the effect such factors should have in disability cases. 43 Fed. Reg. 55349 (1978). The regulations became effective on February 26, 1979. *Ibid.*[3]

The regulations are the basis for hundreds of thousands of disability determinations each year. The disability hearing system managed by the Department of Health and Human Services pursuant to the Social Security Act is " 'probably the largest adjudicative agency in the western world.' " *Santise* v. *Schweiker*, 676 F.2d 925, 930 (3d Cir. 1982), petition for cert. pending, No. 82-5276 (filed Oct. 18, 1982), quoting J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil & M. Carrow, *Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System* xi (1978) ("Mashaw"). Approximately 2.3 million claims for Title II disability insurance benefits and Title XVI disability benefits were filed in fiscal year 1981.[4] Department of Health and Human Services, *Social*

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[2] Numerous public interest groups participated in this phase of the rulemaking process. See 42 Fed. Reg. 8223 (1977); 41 Fed. Reg. 51471 (1976).

[3] The agency later rewrote the regulations to make them clearer and easier to use. 45 Fed. Reg. 55566 (1980).

[4] There are four levels of administrative consideration of disability claims. The first two levels of decision, the initial and reconsideration determinations, are made by state agencies. 42 U.S.C. (Supp. IV) 421(a). The third level of the administrative process is a hearing before an administrative law judge in the Social Security Administration. 42 U.S.C. (Supp. IV) 405(b), 421(d). The fourth level is review by the Appeals Council of the Social Security Administration. Judicial review of the final administrative decision is authorized by 42 U.S.C. (Supp. IV) 405(g), 421(d). See *Califano* v. *Sanders*, 430 U.S. 99, 101-102 (1977).

*Security Annual Report to the Congress for Fiscal Year 1981*, 22, 26 (1982). More than a quarter of a million claimants requested hearings before an administrative law judge ("ALJ"). *Id.* at 29. More than 8000 filed suit in federal district court seeking review of an adverse administrative decision. *Id.* at 31. With respect to a large number of those claims, the ultimate question was whether the claimant's age, education, and work experience, coupled with his impairment, rendered him unable to perform "substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A).

From an early date ALJs were required in many cases to decide that ultimate question with the assistance of vocational experts. See, *e.g.*, *Kerner* v. *Flemming*, 283 F.2d 916 (2d Cir. 1960). These experts, who worked under contract with the Social Security Administration ("SSA"), were professors of rehabilitation counseling, directors of employment agencies, and other persons skilled in job placement and knowledgeable about labor market conditions. After evidence had been introduced about the claimant's medical problems and work experience, the vocational expert would be the last witness called by the ALJ. He would be asked to assume certain relevant facts about the claimant and would then testify about specific job opportunities for a person of that age, education, work experience, and medical condition.

The use of vocational experts was fraught with difficulties. Not only did reliance on vocational experts produce inconsistent results in similar cases, but their testimony was time-consuming and expensive. The medical-vocational regulations[5] were designed to

[5] The term "regulations" will generally be used to refer to 20 C.F.R. Part 404, Subpart P in its entirety. Subpart P in-

eliminate the need for experts in a large number of cases. They establish a sequence for decision of disability claims. Before the guidelines in 20 C.F.R. Part 404, Subpart P, App. 2 may be consulted, the claimant must demonstrate that he is not currently working. If he is, the claim will be denied. 20 C.F.R. 404.1520(b). Second, the claimant must show, on the basis of medical evidence alone, that his impairment is "severe," *i.e.*, that it "significantly limits [his] physical or mental ability to do basic work activities." If it does not, the claim will be denied. 20 C.F.R. 404.1520(c). Third, if the impairment is as severe as those listed in Appendix 1 of the regulations, 20 C.F.R. Part 404, Subpart P, the claimant will receive benefits without regard to his age, education, and skills. 20 C.F.R. 404.1520(d). Fourth, if the impairment is less severe than those listed in Appendix 1, the claimant must show that, because of his impairment, he can no longer perform work he has done in the past. If he can still do such work, his claim will be denied. 20 C.F.R. 404.1520(e). If he cannot do such work, there must be further factual determinations about each of the variables made relevant by the Act and the regulations: the claimant's "residual functional capacity" (*i.e.*, the level of work he can perform, based upon medical evidence, despite his impairment), age, education, and work experi-

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cludes, following 20 C.F.R. 404.1598, two appendices. Appendix 1 is a listing of impairments that are considered presumptively disabling. Appendix 2 is entitled "Medical-Vocational Guidelines" and will generally be referred to as the "guidelines" or "Appendix 2." Within Appendix 2 are various "tables" directing disability outcomes according to claimants' residual functional capacity. Each of the tables contains a number of "rules" for different combinations of age, education, and work experience. See Pet. App. 35a-75a.

ence. 42 U.S.C. 423(d)(2)(A); 20 C.F.R. 404.1545, 404.1560 to 404.1568. With regard to each of these factors, the claimant may introduce evidence and rebut the factual findings made by the Secretary. 20 C.F.R. Part 404, Subpart P, App. 2, Section 200.00(a).

It is only after this detailed and individualized factual inquiry into a claimant's medical and vocational characteristics that the guidelines and tables in Appendix 2 come into play. They are consulted to determine the one question that formerly was the subject of testimony by vocational experts: whether jobs exist in the national economy that can be performed by a person of the claimant's residual functional capacity, age, education, and work experience. The tables do not purport to answer that question for all claimants who have reached the last stage in the decisional sequence. For example, although many physical limitations are relevant to disability determinations, the tables consider only a claimant's strength. For one whose impairment results from mental or sensory limitations, a more individualized determination of available work must be made. 20 C.F.R. Part 404, Subpart P, App. 2, Section 200.00(e).

For those cases in which use of the tables is appropriate, the Secretary in rulemaking proceedings has determined what jobs are available in the national economy. Underlying the table for sedentary work—the most restricted category encompassed by the tables—are approximately 200 unskilled occupations, each representing numerous jobs, that can be performed by claimants with the exertional capacity for a full range of sedentary work. 20 C.F.R. Part 404, Subpart P, App. 2, Section 201.00(a). See

also Section 202.00(a) (1600 unskilled occupations for those able to do light work); Section 203.00(a) (2500 unskilled occupations for those able to do medium work). The weight given to the combinations of age, education, and work experience in each table is based on a further determination of the significance of those factors for the claimant's ability to adapt to new work situations. 43 Fed. Reg. 55353-55355 (1978).[6]

2. Respondent filed a claim for disability benefits in October 1979, alleging disability due to a back problem and high blood pressure (Pet. App. 2a). Her claim was denied initially, and upon reconsideration (*ibid.*). On September 26, 1980, an ALJ concluded after a hearing that respondent was not disabled. He found that while she was unable to

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[6] The sources of data on the numbers of unskilled jobs and the vocational significance of age, education, and work experience are set forth in the preamble to the regulations, 43 Fed. Reg. 55352-55355 (1978), and in the text of the regulations, 20 C.F.R. 404.1566(d) (job data); App. 2, Section 200.00(b) (job data). For example, the determinations about unskilled jobs at various levels are "supported by the 'Dictionary of Occupational Titles' and the 'Occupational Outlook Handbook,' published by the Department of Labor; the 'County Business Patterns' and 'Census Surveys' published by the Bureau of the Census; and occupational surveys of light and sedentary jobs prepared for the Social Security Administration by various State employment agencies." 20 C.F.R. Part 404, Subpart P, App. 2, Section 200.00(b). As later editions of these publications become available—*e.g.*, the fourth edition of the *Dictionary of Occupational Titles* (1977), recently published by the Department of Labor—the guidelines will be updated to incorporate them. 43 Fed. Reg. 55351 (1978); cf. *Sherwin* v. *Secretary of Health and Human Services*, No. 81-1885 (1st Cir. June 22, 1982), slip op. 8-9.

The guidelines also include a detailed textual statement that explains and justifies the tables and rules in Appendix 2 (Pet. App. 52a-75a).

perform her past work, she retained the residual functional capacity for light work (*id.* at 22a-27a). The ALJ found that respondent was then 52 years old ("closely approaching advanced age"), had a marginal education, was able to read and communicate in English, and had unskilled work experience (*id.* at 27a-29a). On the basis of these findings, the ALJ applied Rule 202.10 in Table 2 of Appendix 2, which directed a conclusion that respondent was not disabled (see Pet. App. 69a).

In December 1980, the Social Security Administration Appeals Council denied respondent's request for review (Pet. App. 16a-19a).[7] Respondent then sought judicial review in the United States District Court for the Eastern District of New York. On April 29, 1981, the district court concluded that there was substantial evidence to support the Secretary's decision and dismissed the complaint (*id.* at 15a).

The court of appeals remanded to the Secretary for further evidentiary proceedings (Pet. App. 1a-11a). The court agreed that there was substantial evidence in the administrative record to support the finding that respondent had the residual functional capacity to perform a wide range of light work (*id.* at 7a). It also did not dispute the appropriate classification of respondent's age, education, and work experience.

The court of appeals nevertheless held that the Secretary, in determining whether there was "work

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[7] On April 28, 1982, the agency adjudicated a claim for disability benefits filed by respondent on February 9, 1981. The agency found respondent disabled as of January 1, 1981 on the basis of a change in her condition. The decision on respondent's subsequent claim has no effect on her right to benefits through December 31, 1980, the date of the agency's final decision on the claim now before this Court. See 42 U.S.C. 405(h); 20 C.F.R. 404.957(c)(1); *Califano* v. *Sanders*, 430 U.S. 99 (1977).

* * * in the national economy" (see 42 U.S.C. 423(d)(2)(A)) that respondent could perform, was not entitled simply to rely on the tables in Appendix 2. Rather, the court held, the Secretary must " 'identify specific alternative occupations available in the national economy that would be suitable for the claimant' " and give for each " 'a job description clarifying the nature of the job, [and] demonstrating that the job does not require' exertion or skills not possessed by the claimant." (Pet. App. 9a, quoting *Decker* v. *Harris*, 647 F.2d 291, 298 (2d Cir. 1981)). Without such specificity, the court believed, "the claimant is deprived of any real chance to present evidence showing that she cannot in fact perform the types of jobs that are administratively noticed by the guidelines" (Pet. App. 10a).

3. The court of appeals did not specifically state that the medical-vocational regulations are invalid. The very purpose of the regulations, however, is to determine conclusively the types and numbers of occupations available, and their suitability for claimants whose medical and vocational characteristics are described in the tables. To reopen any of those questions is to render the regulations useless, if not invalid. Moreover, given the limitations on judicial review of agency action, see 42 U.S.C. (Supp. IV) 405(g), the court had no authority to supplant reliance on the tables in Appendix 2 unless the regulations directing such reliance are invalid. 20 C.F.R. 404.1569; App. 2, Section 200.00(a).[8]

[8] The court did state that "[i]n failing to show suitable available alternative jobs for Ms. Campbell, the Secretary's finding of 'not disabled' is not supported by substantial evidence" (Pet. App. 11a). That criticism evidently applies to

The court of appeals also recognized that the demands it was making on the adjudicatory system had "[i]n the past * * * been [satisfied] largely through the use of vocational testimony to establish that there are specific jobs suitable to the claimant's capabilities" (Pet. App. 9a). It has since indicated its inclination to require the same procedure in future cases. *Noel* v. *Schweiker*, No. 81-6156 (2d Cir. Feb. 22, 1982) (unpublished). See Reply Br. 4.

## SUMMARY OF ARGUMENT

### I.

The medical-vocational regulations implement the explicit authority given to the Secretary in 42 U.S.C. 405(a) and 42 U.S.C. (Supp. IV) 423(d)(5). Section 405(a) authorizes the promulgation of all rules "appropriate" to carry out the provisions of Title II and states that the Secretary "shall adopt" rules governing the quantity and quality of evidence necessary to support a finding of eligibility for benefits. Section 423(d)(5) reiterates the Secretary's power to regulate proof in disability cases. The regulations issued pursuant to this authorization to interpret the terms of the statute are entitled to legislative effect. *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981). The courts of appeals, with the exception of the Second Circuit, have given them that deference.

The authorization for the regulations is evident not only on the face of the Act, but also in the legislative

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the adjudication of respondent's claim, rather than to the rulemaking proceeding that resulted in promulgation of the regulations. Cf. 5 U.S.C. 706(2)(E). But the evidence that the court found lacking was rendered unnecessary by the regulations, so its absence is significant only if the regulations are invalid.

history that preceded and followed their promulgation. From the time the Act was amended to include disability provisions, Congress expressed a desire that the broad terms of the legislative definition be implemented by specific regulations based on the Secretary's experience in administering it. And for 18 years before promulgation of the medical-vocational regulations Congress expressed its hope that the Secretary would develop specific criteria to govern the effect of nonmedical factors on the evaluation of disability. Since the regulations were proposed, Congress has amended the disability provisions on six occasions, but has declined to disturb the regulations.

II.

The medical-vocational regulations are a significant improvement over the former procedure for evaluating vocational characteristics. The testimony of vocational experts about the effect of a claimant's age, education, work experience, and impairment on his job capabilities proved to be expensive, time-consuming, inaccurate, and inconsistent. Those difficulties resulted from a number of causes: the experts' knowledge of the labor market was both limited and variable; their testimony also slighted, on occasion, the vocational factors that Congress considered relevant; and perhaps most important, there was no way to assure that experts in different cases assigned the same weight to claimants' medical and vocational traits. The regulations replace that system with a uniform, accurate, and efficient means for making disability determinations, based on the job sources formerly considered by vocational experts, in the thousands of cases each year in which age, education, and work experience are relevant.

## III.

The regulations are procedurally fair. They do not come into play except in cases reaching the last step in the sequential disability evaluation process. Even then, they are consulted only after all of the claimant's relevant individual characteristics have been ascertained through proof at a hearing.

It is unnecessary to require, as respondent would (Br. in Opp. 9-10), that the Secretary identify specific jobs for a claimant in order to illustrate the meaning of residual functional capacity. The physical demands of jobs underlying the tables are clearly spelled out in the regulations, which are available to claimants at district and branch offices. Claimants have the right to be represented at hearings, and when they are not, the administrative law judge has a special obligation to develop a full and fair record—an obligation that was satisfied in this case.

It is also unwise to relitigate in each case, as the court of appeals would require, the question of the types and numbers of jobs that exist in the national economy. Even when vocational experts were used at hearings, proof of those facts was unnecessary in many cases. Moreover, the court of appeals erred in believing that it was necessary to prove the suitability of specific jobs for disability claimants. That burden need not be imposed because the guidelines only direct a finding of nondisability in cases where the number of jobs that exist is very large. Neither the court of appeals nor respondent has challenged the accuracy of the job data underlying the regulations and tables. Finally, the court's requirement ignores the Secretary's authority to dispense with costly fact-finding procedures in the face of a burgeoning disability caseload and to proceed by general rule.

## ARGUMENT

### THE MEDICAL-VOCATIONAL REGULATIONS ARE A LAWFUL EXERCISE OF THE SECRETARY'S RULEMAKING AUTHORITY UNDER THE SOCIAL SECURITY ACT

#### I. The Medical-Vocational Regulations Implement The Authority Delegated To The Secretary By Congress

Regulations that implement an explicit delegation of authority by Congress are entitled to legislative effect and should be upheld unless they are arbitrary or exceed the statutory mandate. The medical-vocational regulations are a reasonable and appropriate exercise of the Secretary's rule-making authority. They were adopted at the repeated urging of the congressional committees charged with oversight of the social security laws.

##### A. *The Regulations Carry Out Explicit Delegations of Statutory Authority In Connection With the Disability Programs*

1. The medical-vocational regulations were promulgated by the Secretary pursuant to a broad grant of statutory authority. 42 U.S.C. 405(a) provides:

> The Secretary shall have full power and authority to make rules and regulations * * * which are necessary or appropriate to carry out [the] provisions [of Title II], and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

This section gives two directions. The first grants the Secretary "full power and authority" to promulgate any regulations "necessary or appropriate" to implement the disability provisions of the Act. The

medical-vocational regulations are an appropriate means to carry out the statutory command that age, education, and work experience be considered along with claimants' mental or physical impairments in determining entitlement to disability benefits. 42 U.S.C. 423(d)(2)(A). The second direction in Section 405(a) is both more explicit and mandatory. It states that the Secretary "shall adopt" rules that are both procedural ("the method of taking and furnishing" proof) and substantive ("the nature and extent for the proofs and evidence"). In the second clause "Congress has authorized, if it has not required, the Secretary to issue regulations prescribing both the quality ('nature') and quantity ('extent') of evidence necessary to support a finding of entitlement to disability benefits." *McCoy* v. *Schweiker*, 683 F.2d 1138, 1143 (8th Cir. 1982), ~~slip op. 9~~. As the Eighth Circuit stated in *McCoy* (*ibid.*), "a decision as to what kinds of cases are appropriate for the testimony of vocational experts is squarely within the rubric 'nature and extent of the proofs and evidence.' "

Section 405(a) is not the only basis for the authority exercised by the Secretary. 42 U.S.C. (Supp. IV) 423(d)(5) states:

> An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.

This provision repeats—in the very section in which "disability" is defined—the direction given in Section 405(a) regarding Title II generally: that the existence of a disability is to be determined according to standards regarding "medical and other evidence"

fixed by the Secretary.[9] The issue whether a vocational expert should be required to give evidence about the interplay of the medical and vocational factors with the demands of the labor market falls squarely within the authority given the Secretary.

Other provisions in the same section underscore Congress's evident purpose to have the Secretary flesh out the meaning of the statutory term. The definition of disability, which merely directs "consider[ation]" of how the claimant's age, education, and work experience affect his ability to do substantial gainful work, 42 U.S.C. 423(d)(2)(A), is clearly not self-executing. It would be irrational to conclude that the Secretary has exceeded the generous scope of his rule-making authority by attempting to assure that a general congressional definition of entitlement is made specific enough to be applied consistently in vast numbers of cases.

Moreover, the subsection immediately following the definition of disability states that widows and certain other claimants shall be considered disabled only if their "impairments are of a level of severity which under regulations prescribed by the Secretary [are] deemed to be sufficient to preclude * * * gainful activity." 42 U.S.C. 423(d)(2)(B). And 42 U.S.C. (Supp. IV) 423(d)(4) states that "[t]he Secretary shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity." [10] It would be

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[9] Provisions comparable to Sections 405(a) and 423(d)(5) are found in Title XVI. See 42 U.S.C. 1383(d)(1), (e)(1).

[10] Section 423(d)(4) also provides that there shall be excluded from earnings the cost of services, devices, and drugs "which are necessary (as determined by the Secretary in reg-

odd if the Secretary were given the power to define by regulation the requisite severity of an impairment, but denied the power to specify what consideration should be given to the equally general vocational factors enumerated in the same section. It would also be strange if the Secretary were permitted to promulgate rules disqualifying claimants because of the kind of work they are currently performing, but not allowed to promulgate rules governing the effect that past work should be given.

2. This Court recently rejected a claim, similar to the court of appeals' conclusion, that the Secretary was required to make individualized factual determinations regarding the income "available" to Medicaid applicants under 42 U.S.C. 1396a(a)(17). That section states that the availability of income and resources shall be determined "in accordance with standards prescribed by the Secretary * * *." In *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981), the Court held:

> In view of this explicit delegation of substantive authority, the Secretary's definition of the term "available" is "entitled to more than mere deference or weight" * * *. Rather, the Secretary's definition is entitled to "legislative effect" because, "[i]n a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term." * * * Although we do not abdicate review in these circumstances, our task is the limited one of ensuring that the Secretary did not "excee[d] his statutory au-

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ulations)" to enable the individual to work, and "that the amounts to be excluded shall be subject to such reasonable limits as the Secretary may prescribe."

thority" and that the regulation is not arbitrary or capricious.

See also *Herweg* v. *Ray*, No. 80-60 (Feb. 23, 1982), slip op. 9; *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977).

With the exception of the Second Circuit, the courts of appeals have found "[t]he language of 42 U.S.C. § 405(a) [and 423(d)(5)] * * * different from that of the authorizing statutes in *Herweg*, *Gray Panthers*, and *Batterton*, but * * * hardly less emphatic" (*McCoy* v. *Schweiker*, *supra*, slip op. 11-12). They also have concluded that the medical-vocational regulations are an appropriate means of carrying out the Secretary's statutory authority. *Id.* at 15-22; *Torres* v. *Secretary of Health and Human Services*, 677 F.2d 167, 169 (1st Cir. 1982); *Santise* v. *Schweiker*, 676 F.2d 925, 932-936 (3d Cir. 1982), petition for cert. pending, No. 82-5276 (filed Oct. 18, 1982); *Rivers* v. *Schweiker*, No. 81-1413 (5th Cir. Sept. 7, 1982), slip op. 4481; *Kirk* v. *Secretary of Health and Human Services*, 667 F.2d 524, 530-531 (6th Cir. 1981), petition for cert. pending, No. 81-6754 (filed May 20, 1982); *Cummins* v. *Schweiker*, 670 F.2d 81, 83 (7th Cir. 1982); *Broz* v. *Schweiker*, 677 F.2d 1351, 1357-1359 (11th Cir. 1982).[11] See also *Frady* v. *Harris*, 646 F.2d 143, 144-145 (4th Cir. 1981).

3. It is not surprising that the courts have found, with such uniformity, that the medical-vocational regulations effectuate the Secretary's statutory au-

[11] In *Broz* the court sustained the Secretary's authority to enact regulations specifying the effect of residual functional capacity, education, and work experience on a claimant's ability to engage in substantial gainful work, but held that individualized consideration must be given to the effect of age on disability claimants. 677 F.2d at 1359-1361.

thority. The definition of disability in the statute provides the framework both for the regulations themselves and for the guidelines and tables in Appendix 2. The statute declares that a claimant shall be considered disabled if his physical or mental impairment, taken together with his age, education, and work experience, renders him unable to engage in "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. 423(d)(2)(A). As we explain in Part II, the decision of that issue depends on several judgments that can most consistently, accurately, and efficiently be made by rule, rather than case-by-case adjudication.

In the first place, the decision demands an encyclopedic knowledge of the types of jobs available throughout the country, the numbers of such jobs that exist, and the physical, educational, and experiential requirements for satisfactory performance of each type of job. The tables in Appendix 2, which are the product of years of exhaustive research and public comment (see pages 2-3, *supra*), incorporate the Secretary's determination of how many types of unskilled jobs are available in significant numbers for people whose strength is limited in certain ways. See 20 C.F.R. Part 404, Subpart P, App. 2, Sections 201.00(a), 202.00(a), 203.00(a).[12] The tables also incorporate the Secretary's determination that where a claimant has a greater level of education or work skills, he may have a greater range of occupations to choose from if his knowledge is "readily transferable to a significant range of semi-skilled or skilled work

[12] Unskilled jobs are those that "can be performed after a short demonstration or within 30 days, and do not require special skills or experience." 20 C.F.R. Part 404, Subpart P, App. 2, Section 202.00(a).

within an individual's residual functional capacity * * *." App. 2, Section 202.00(e). They accordingly give separate consideration to claimants whose education or experience provides for direct entry into skilled work, based on the Secretary's determination of the availability of skilled and semi-skilled occupations. See 20 C.F.R. 404.1564, 404.1565, 404.1568.

In the second place, the tables, guidelines, and regulations incorporate the Secretary's determination of issues that are less strictly empirical, but that Congress nonetheless left for his resolution. These include such factors as the effect of age on a claimant's ability to adapt to a new job and the number of job opportunities that will satisfy the "significant numbers" requirement in Section 423(d)(2)(A). A comparison with Appendix 1 will illustrate this point. 20 C.F.R. Part 404, Subpart P, App. 1 lists certain medical impairments thought to be so severe that they are per se disabling. Among them are deafness and muteness, App. 1, Sections 2.08, 2.09, even though many deaf and mute individuals in fact are able to hold jobs. On the other hand Appendix 1 does not list the loss of a hand as presumptively disabling, cf. App. 1, Section 1.09, even though that may be a great functional impairment. The line drawn is not a scientific one; rather, it represents an informed judgment about the individual's likely ability to adapt and perform successfully in a competitive labor market. See Goldhammer, *The Effect of New Vocational Regulations on Social Security and Supplemental Security Income Disability Claims*, 32 Ad. L. Rev. 501, 502-503 (1980). The same is true about the Secretary's determination of the effect of age, or his decision that a person who is 45, severely impaired, and illiterate is disabled, while an otherwise identical individual with a limited education is not. 20 C.F.R. Part 404, Subpart P, App. 2, Table No. 1, Rules 201.17, 201.18.

Given the nature of those judgments, it makes little sense to repeat them, with varying outcomes, in individual proceedings. The very existence of a disability program necessitates the drawing of such lines, but the task of doing so was left by Congress to the Secretary.

### B. *Congress Urged The Adoption Of, And Has Implicitly Ratified, The Regulations*

In 1954, when Congress amended the Social Security Act to afford disability coverage,[13] it provided that an individual should be deemed disabled if he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that could be expected to be prolonged or result in death. 42 U.S.C. 423(d)(1)(A).[14] What Congress offered was "a legislative definition written in rather broad terms to be implemented by more specific administrative regulations on the basis of operational experience." Subcomm. on the Administration of the Social Security Laws, 86th Cong., 2d Sess., *Administration of Social Security Disability Insurance Program: Preliminary Report to the House*

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[13] In 1954 Congress created a "freeze" program perpetuating coverage of workers during periods of disability when they were unable to continue paying into the Social Security system. Social Security Amendments of 1954, ch. 1206, Section 106, 68 Stat. 1080. In 1956 Congress authorized the payment of benefits to disabled workers at age 50. Social Security Amendments of 1956, ch. 836, Section 103, 70 Stat. 815. In 1958 benefits were extended to the dependents of disabled workers. Social Security Amendments of 1958, Pub. L. No. 85-840, Section 205, 72 Stat. 1021. In 1960 Congress extended eligibility for benefits to disabled workers below age 50. Social Security Amendments of 1960, Pub. L. No. 86-778, Section 401, 74 Stat. 967.

[14] The currently effective provision, cited in text, differs in respects not here relevant from that enacted in 1954.

*Comm. on Ways and Means* 14 (Comm. Print 1960) (*"Preliminary Report"*); S. Rep. No. 1987, 83d Cong., 2d Sess. 21 (1954).

Although the original statutory definition of disability was framed in terms of purely medical criteria, the Social Security Administration recognized from the outset "the importance of the nonmedical factors, such as age, experience, and education of the individual." *Administration of Social Security Disability Insurance Program: Hearings Before the Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means*, 86th Cong., 1st Sess. 81, 82-88 (1959). Congress not only viewed that as an appropriate interpretation of the Act; it also suggested that SSA should provide by regulations the precise weight to be given such considerations. *Preliminary Report, supra*, at 18 (emphasis in original):

> *The subcommittee recognizes the difficulty of developing and enunciating specific criteria for the weight to be given nonmedical factors in the evaluation of disability and the extreme sensitivity of this area. But the subcommittee believes that the time has come, if it is not well overdue, to make a determined effort to develop and refine these criteria and make them available to the evaluators and to the public in the form of published regulations.*

Although SSA developed administrative materials (for use by state agencies in their initial and reconsideration determinations) that detailed the weight to be given to vocational factors, 43 Fed. Reg. 55350-55351 (1978); see pages 28-29, *infra*, it did not issue vocational regulations at that time.

In 1967 Congress amended the Act to make explicit its concern that such factors be weighed as part of

disability determinations. 42 U.S.C. 423(d)(2)(A). It also redefined "substantial gainful work" to mean work that exists in the national economy, not work that a claimant could actually find in the area where he lives. *Ibid.* Although the legislative history of those amendments does not specifically address the publication of vocational regulations, it does make several points relevant to a decision about their validity. First, it notes with approval the approach that the Secretary had taken to implement the Act—an approach that had included the use at the state level of materials very similar to the current regulations. See pages 28-29, *infra;* 113 Cong. Rec. 23116 (1967) (remarks of Rep. Rostenkowski); *id.* at 23065 (remarks of Rep. King); see also H.R. Rep. No. 544, 90th Cong., 1st Sess. 28-31 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 46-49 (1967).

Second, Congress noted its concern that the statutory definition "be applied with uniformity and consistency throughout the Nation * * *." H.R. Rep. No. 544, *supra*, at 30; 113 Cong. Rec. 23065 (1967) (remarks of Rep. King). Finally, and perhaps most significantly, there is the stated recognition that the Secretary would continue to implement the statute through regulations that would explain and elaborate upon the broad statutory language. Concerning the newly adopted section on the effect of work and earnings, 42 U.S.C. 423(d)(4), the Statement of the Managers on the Part of the House declared (H.R. Conf. Rep. 1030, 90th Cong., 1st Sess. 51-52 (1967)): "The Secretary of Health, Education, and Welfare is directed to establish criteria which are to be conclusive for determining when work or earnings demonstrate ability to engage in substantial gainful activity." Similarly, both the House and Senate Reports state that the level of severity at which an impairment—

taken alone—should be considered presumptively disabling is a matter for the Secretary to determine by administrative rules. H.R. Rep. No. 544, *supra*, at 30, 31; S. Rep. No. 744, *supra*, at 49.

The administrative policies affirmed in the 1967 amendments continued, however, to be published only in the manuals used by state agencies processing initial and reconsideration determinations. They were not binding on or even readily available to administrative law judges or the federal courts. See 43 Fed. Reg. 55349 (1978). As a result, the first two levels of administrative consideration of disability claims applied standards not always reflected in the courts and in decisions of administrative law judges, who had to rely on the testimony of vocational experts.

A 1974 report on the disability insurance program prepared by the staff of the House Ways and Means Committee criticized this situation.

> The original idea was that the broad language of the statutory definition would be amplified by regulations based on operational experience. As it turned out the Courts, rather than the Social Security Administration or the Congress, have effectuated the major changes in the definition, particularly in the area of the definition's somewhat subjective nonmedical factors. * * *
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> * * * The staff believes that the Department of HEW with the assistance of skilled personnel from the State Agencies and those in the private sector with expertise in disability adjudication should explore the possibilities as to whether the definition of disability can be stated more specifically in the law or regulations, and whether more operational presumptions may be incorporated into its administration so that the defini-

tion can be more effectively applied to greatly accelerating caseloads.

Staff of House Comm. on Ways and Means, 93d Cong., 2d Sess., *Report on the Disability Insurance Program* 6 (1974) (*"1974 Report"*); see also *id.* at 45, 50, 81.

Several months after publication of the *1974 Report*, the Social Security Administration completed an internal report on the disability claims process which also concluded that disability standards needed to be spelled out in regulations. Social Security Administration, *Report of the Disability Claims Process Task Force* 46 (1974), *reprinted in* Subcomm. on Social Security of the House Comm. on Ways and Means, 94th Cong., 1st Sess., *Recent Studies Relevant to the Disability Hearings and Appeals Crisis*, at 46 (Comm. Print 1975). The agency then drafted the medical-vocational regulations and began the review process that precedes issuance by the Secretary of a notice of proposed rulemaking. In the case of the medical-vocational regulations, this process involved extensive review by expert consultants, state agency personnel, and congressional committees and their staffs.

In May and June 1976, the Subcommittee on Social Security of the House Ways and Means Committee held hearings that focused on the draft regulations. In connection with the hearings, the Subcommittee staff reprinted the regulations and prepared a legislative issue paper noting that Congress had been pressing for issuance of regulations on the vocational factors for 16 years. *Disability Insurance Program: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 22, 166-266 (1976) (*"Disability Insurance Program: 1976 Hearings"*). In response to written questions from the Subcommittee, the Commissioner

of Social Security stated that Section 205(a) of the Act, 42 U.S.C. 405(a), provided sufficient statutory authority for the Secretary's issuance of the draft regulations. *Disability Insurance Program: 1976 Hearings*, *supra*, at 289-290.

In 1976 Representative Burke (Chairman of the House Subcommittee on Social Security) introduced a bill that would have required the Secretary to promulgate the medical-vocational regulations after a 60-day comment period. H.R. 15630, 94th Cong., 2d Sess. Section 7, at 23 (1976). Representative Burke acknowledged that it was too late in the legislative session to take action on the bill, but stated that he wished to focus discussion on the disability program so that action would be taken early in the next session. Subcomm. on Social Security of the House Comm. on Ways and Means, 94th Cong., 2d Sess., *H.R. 15630—Disability Insurance Amendments of 1976*, 1 (Comm. Print 1976).

The next year Representative Burke introduced a revised bill. H.R. 8076, 95th Cong., 1st Sess. (1977). He noted that the agency had promised to publish a notice of proposed rulemaking concerning the medical-vocational regulations that year and that the Administration believed the regulations were authorized by the statute. Subcomm. on Social Security of the House Comm. on Ways and Means, 95th Cong., 1st Sess., *H.R. 8076—Disability Insurance Amendments of 1977*, 7 (Comm. Print 1977). Consequently, the revised bill included no provision requiring promulgation of the regulations.

The notice of proposed rulemaking was not issued, however, by the time the House Subcommittee held hearings on the disability program in February 1978. In a colloquy during the hearings, the Acting Commissioner of Social Security stated that the notice would be published shortly. *Disability Insurance Pro-*

*gram—1978: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 66 (1978). A month later the notice was published, 43 Fed. Reg. 9284 (1978), a fact noted favorably by the House Subcommittee. Subcomm. on Social Security of the House Comm. on Ways and Means, 95th Cong., 2d Sess., *Disability Insurance—Possible Areas of Subcommittee Action* 14 (Comm. Print 1978).

Shortly thereafter, after considering several bills that would have redefined disability in the Act, the Subcommittee concluded that no legislative action should be taken until it could be determined whether operation of the new regulations adequately met the problems in the program. It unanimously approved a bill that included no change in the definition of disability. See Subcomm. on Social Security of the House Comm. on Ways and Means, 95th Cong., 2d Sess., *Proposed Disability Insurance Amendments of 1978 (H.R. 14084)* (Comm. Print 1978). The final regulations were promulgated in November 1978 and became effective on February 26, 1979. 43 Fed. Reg. 55349 (1978).

Since 1976, when it first held hearings on the medical-vocational regulations, Congress has amended 42 U.S.C. 405 and 423—which define disability and authorize the Secretary to implement the definition with regulations—on six different occasions.[15] Among other

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[15] Pub. L. No. 97-123, Section 6, 95 Stat. 1664 (Section 423(f)); Pub. L. No. 96-473, Section 5(a)(1), (c), 94 Stat. 2264, 2265 (Section 423(d)(6), (f)); Pub. L. No. 96-265, Title I, Section 102(b), Title III, Sections 302(a)(1), 303(b)(1)(A), (2)(A), 305(a), 306(c), 307, 309(a), 94 Stat. 443, 450, 451, 453, 457, 458, 459 (Section 405(b), (g); Section 423(a)(1), (2), (b), (d)(4)-(5), (e)); Pub. L. No. 95-600, Title VII, Section 703(j)(14)(B), 92 Stat. 2942 (Section 405(p)(3)); Pub. L. No. 95-216, Title III, Sections 335, 353(f)

changes, Congress has required the Secretary to justify unfavorable disability decisions with a discussion of the evidence and the basis for the decision (Pub. L. No. 96-265, Section 305(a), 94 Stat. 457 (Section 405(b)); amended the provision dealing with judicial review (Pub. L. No. 96-265, Section 307, 94 Stat. 458 (Section 405(g)); and enlarged Section 423(d)(5), which authorizes the Secretary to promulgate the regulations at issue here (Pub. L. 96-265, Section 309(a), 94 Stat. 459). On each of those occasions Congress declined to disturb the Secretary's exercise of his statutory authority, of which it was fully cognizant. "Congress has been made aware of [the regulations], yet [six] times has 'revisited the Act and left the [regulations] untouched.'" *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978) (footnote omitted), quoting *Saxbe* v *Bustos*, 419 U.S. 65, 74 (1974).

In light of this history, the court of appeals was plainly unwarranted in rejecting the sufficiency of the medical-vocational guidelines to support determinations of nondisability. Judicial deference is especially appropriate "'when Congress has refused to alter the administrative construction' * * *" and "that construction accords with well-established congressional goals." *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, *supra*, 439 U.S. at 248 251, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). "[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the lat-

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(2), 91 Stat. 1547, 1554 (Section 405(c)(1)(A), (D), (o); Section 423(d)(4)); Pub. L. No. 94-455, Title XII, Section 211(b), 90 Stat. 1711 (Section 405(c)(2)).

ter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979), quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940). See also *Haig* v. *Agee*, 453 U.S. 280, 300-301 (1981).

**II. The Medical-Vocational Regulations Provide A Uniform, Accurate, And Efficient Means For Making Disability Determinations**

The medical-vocational guidelines improve disability determinations made both by state agencies at the initial and reconsideration stages and by administrative law judges at the hearing stage. Before the medical-vocational regulations were promulgated in 1978, state agencies and administrative law judges integrated medical evidence with information about a claimant's age, education, and work experience in different ways. State agencies used detailed guides developed by the Social Security Administration that incorporated the same principles as the guidelines, but lacked the structure and organization of the tables in the guidelines. For example, the *Disability Insurance State Manual* (*"Manual"*) provided in 1963 that "[c]ases should be put through sequential evaluation tests." Department of Health, Education, and Welfare, Social Security Administration, *OASI Disability Insurance Letter No. III-3*, at 1 (Sept. 20, 1963) (*"DIL No. III-3"*).[16] The first issue was

[16] The *Disability Insurance State Manual* included Disability Insurance Letters like that cited in text. The same materials were included in the Bureau of Disability Insurance, *Vocational Specialist Training Handbook*, cited below. Copies of relevant portions of the *Vocational Specialist Training Handbook*, including *DIL No. III-3*, have been lodged with the Court and furnished to counsel for petitioner.

whether the claimant—if not actually working—could be found disabled solely on the basis of the medical listings then found in 20 C.F.R. 404.1502(a) (1961). Except in unusual cases, see 20 C.F.R. 404.1502(c) (Cum. Supp. 1964), state agencies were then directed to determine whether a claimant was able to do his past work (*DIL No. III-3, supra*, at 3). If he was not, the next issue was whether there was other substantial gainful activity the claimant could perform. As an example, the *Manual* suggested (*id.* at 5):

> Generally, the applicant who retains the physical ability to do a wide range of light work, who is not of advanced age (ordinarily under 55 years of age), and is able to communicate, read and write on an elementary level may be considered to still be in the competitive labor market for light unskilled work, despite the absence of special experience or skills * * *.

"Light work" was defined as:

> equivalent to lifting 20 pounds maximum with frequent lifting and/or carrying of objects weighing up to 10 pounds, or requiring walking or standing to a significant degree, or requiring sitting most of the time but entailing pushing and pulling of arm and/or leg controls.

Bureau of Disability Insurance, *Vocational Specialist Training Handbook* 2-50 (*"Training Handbook"*).[17] Cf. 20 C.F.R. 404.1567(b). As is evident from the

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[17] The *Vocational Specialist Training Handbook* was used by SSA to train vocational specialists within each state office responsible for making the initial and reconsideration decisions. Such state offices were established by agreement between the state and the Secretary, 42 U.S.C. 421(b), and were reimbursed for their services out of trust funds. 42 U.S.C. 421(e). Sections 421(b) and 421(e) have since been amended.

similarity to the currently effective provisions, these guides were incorporated into the medical-vocational regulations at issue here. 43 Fed. Reg. 55351 (1978).[18]

Although these state agency materials included the same principles as the current regulations, they "were often incomplete, vague, contradictory, time consuming to implement, and subject to divergent interpretations." Comptroller General of the United States, *The Social Security Administration Should Provide More Management And Leadership In Determining Who Is Eligible For Disability Benefits* 10 (1976). The 1976 study by the Comptroller General reported that a study of ten state agencies showed complete agreement on the proper disposition of only 22% of a test group of disability claims. *Id.* at 6-10.

On the other hand, administrative law judges—who were not bound by the *Disability Insurance State Manual* and to whom the *Manual* was not even generally available (see 43 Fed. Reg. 55351 (1978))—relied on vocational experts to weigh the significance of claimants' medical and vocational characteristics. After evidence had been introduced about the claimant's medical problems and work experience, the vocational expert would be called by the ALJ. SSA's Office of Hearings and Appeals provided the following example of the proper method for an ALJ to question the vocational expert (*1974 Report, supra*, at 95):

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[18] Both the *Disability Insurance State Manual* and the *Vocational Specialist Training Handbook*, in assessing the significance of the vocational factors, relied upon many of the sources underlying the medical-vocational regulations, such as the *Dictionary of Occupational Titles, supra*, the Bureau of Labor Statistics, *Occupational Outlook Handbook*; Bureau of the Census, *County Business Patterns*; and the Bureau of the Census, *Census Reports*; 43 Fed. Reg. 55350-55351 (1978); *Training Handbook, supra*, at 5-1 to 5-6.

*Q.* Dr. Jones (the Vocational Expert), we have a picture of what Mr. Smith did in the past from the documentary evidence of record. Will you kindly summarize his background, especially his work experience and all other factors which you take into consideration in evaluating vocational capacity of an individual, especially Mr. Smith's.

*A.* [Vocational expert summarizes claimant's education and work history.]

*Q.* The jobs that you mentioned were jobs that you found the claimant had done some time in the past according to the record, is that right?

*A.* Yes, sir.

*Q.* Now, Dr. Jones, what is your understanding of sedentary work?

*A.* (Answer given probably as in Dictionary of Occupational Titles.)

*Q.* What is your understanding of light work?

*A.* (Answer given probably as in Dictionary of Occupational Titles.)

*Q.* What is your understanding of moderate work?

*A.* (Answer given probably as in Dictionary of Occupational Titles.)

*Q.* Under the assumption that I will find from the medical evidence in this case that there is no physical impediment to Mr. Smith's undertaking and performing sedentary (light or moderate) work activity, as same was described by you, do you know of any jobs which exist in this region which you feel Mr. Smith is vocationally qualified to perform based on his age, education, training, and background?

*A.* (Vocational expert responds.)

> [T]he hearing examiner * * * can follow through for further amplification with specific questions as to the physical requirements, such as the necessity for bending, lifting, turning, stooping, etc.; the tools and equipment used; the working conditions * * *.

In making his decision about the existence of suitable jobs for a particular claimant, the vocational expert would rely on the same sources that state agencies used in the initial and reconsideration decisions.[19] Applying that information to particular cases required the vocational expert to make several judgments.[20] These included: (i) in cases where the

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[19] See note 18, *supra*. These materials are also among those of which the current regulations take administrative notice. 20 C.F.R. 404.1566(d); *Kirk* v. *Secretary of Health and Human Services*, *supra*, 667 F.2d at 530.

[20] Every job involves various physical demands, such as strength (exertion), balancing, stooping, manual dexterity, and aural and visual acuity. Moreover, jobs are performed under a variety of different working conditions: they may be indoors or outdoors, subject to extremes of temperature, humidity, noise, toxic conditions, or other hazards. They may also require an applicant to have more or less education or vocational training. For example, operating a dough mixer in the baking industry is classified as light work, but it involves stooping or crouching, as well as a degree of manual dexterity. The job is also performed in conditions that are often hot, humid, and dusty. The training required to undertake the job may last from six months to a year. Department of Labor, *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* 129 (1981). By contrast, the job of garment bagger in the laundry industry—also classified as light work—involves no additional physical demands other than some manual dexterity. The job is not performed under any unusual environmental conditions and can be learned after only a brief demonstration. *Id.* at 212.

claimant had physical limitations other than strength (*e.g.*, lack of dexterity, or a reaction to dust), the types of jobs unavailable because of the demands of the work or the environment; (ii) the effect of the claimant's education and skills on the types of jobs open to him; (iii) the effect of the claimant's age on his ability to adapt to his impairment and to a job situation requiring unfamiliar skills, and on his physical abilities (such as vision, hearing, manual dexterity, balance, and agility) other than strength; and (iv) given the types of jobs the claimant could perform, the number of such jobs existing in the national economy.

Because of the nature of the judgments made by vocational experts, it is not surprising that they frequently reached inconsistent results in similar cases. *Santise* v. *Schweiker*, *supra*, 676 F.2d at 930. The apparent arbitrariness of this adjudicatory system resulted from a number of causes. First was the occasional failure of the expert to consider all the vocational factors that Congress considered relevant and to relate them to the claimant's medical condition. See *Dobrowolsky* v. *Califano*, 606 F.2d 403, 408 (3d Cir. 1979). Second, and perhaps more serious, was the tendency of experts to assign different weights to the claimant's relevant medical and vocational characteristics. Although the question about the jobs available to a claimant of a given description masqueraded as a factual issue, it actually involved judgments like those mentioned in the last paragraph, and policy decisions. For example, the statutory requirement that age be considered in determining a claimant's ability to perform a job (42 U.S.C. 423(d)(2)) is not susceptible of any precise calibration. There is unquestionably an "increasing physiological deterioration in the senses, joints, eye-hand coordination, reflexes, thinking processes, etc., which diminish[es]

a severely impaired person's aptitude for new learning and adaptation to new jobs." 43 Fed. Reg. 55359 (1978); cf. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 315 (1976). But precisely how those often unmeasurable effects of senescence should affect a claimant's entitlement to disability benefits is a matter that Congress did not specify and on which various experts could disagree. See also Mashaw, *supra*, at 78. Third, an important part of what the vocational expert did was to inform the ALJ of the number and types of jobs available in the national economy, and that question received different answers because of the ALJs' and the experts' "limited and variable knowledge of the labor market." *Cummins* v. *Schweiker*, *supra*, 670 F.2d at 83.

There were other problems with the use of vocational experts as well. "Their usage in live testimony * * * increased from slightly under 5,000 in 1965 to over 13,000 in fiscal 1973." *1974 Report*, *supra*, at 94. By 1978 vocational experts were used in more than 40% of all disability hearings, which by then numbered approximately 200,000 annually. DMIS/OHA, *Participant Involvement In Request For Hearing Cases* (Mar. 1982); DMIS/OHA, *FY 81 Key Workload Indicators* 1 (Nov. 20, 1981). That imposed significant monetary costs on the hearing process, since experts were under contract with SSA. *1974 Report*, *supra*, at 94. It also was time-consuming. *Kirk* v. *Secretary of Health and Human Services*, *supra*, 667 F.2d at 530.

The medical-vocational regulations were designed to resolve these difficulties. Most obviously, and most importantly, they address the problem of inconsistent treatment of disability claimants. One virtue of the approach required by the regulations is that it focuses the ALJ's attention on the specific factors that affect

an individual's employability. Before he can even profitably consult the guidelines the ALJ must take evidence and make specific findings regarding the claimant's residual functional capacity, work experience, education, and age. He must also consider any non-exertional physical or mental impairments the claimant may have, since the existence of such problems will preclude a straightforward use of the guidelines. 20 C.F.R. 404.1569; 20 C.F.R. Part 404, Subpart P, App. 2, Section 200.00(e).

A second virtue of the regulations is that they provide a consistent judgment about the weight to be given the various vocational characteristics. For instance, the regulations eliminate the unfairness of treating claimants of the same age differently on the basis of unmeasurable facts about senescence. In place of the former system they provide, for example, that all those over 55 who are severely impaired, and have limited education and no work experience, are disabled regardless of their residual functional capacity. 20 C.F.R. Part 404, Subpart P, App. 2, Tables 1, 2 and 3, Rules 201.01, 202.01, 203.01. They also provide that all impaired claimants over 50 who are illiterate and unskilled are disabled, unless they have at least the residual functional capacity to do medium work. See, Rules 201.09, 202.09, 203.18. Each of those conclusions rests on a factual judgment about the types of jobs open to such individuals, a judgment made by the Secretary after a thorough review and interpretation of the available data. 43 Fed. Reg. 55352-55355 (1978). Each also relies, however, on a policy judgment about whether the jobs an individual is capable of performing are sufficiently "significant" in number to satisfy the statutory requirement. 42 U.S.C. 423(d)(2)(A).

Still a third aspect of the regulations that leads to more consistency is the fact that they incorporate a fund of knowledge about the types and numbers of jobs available that is more encyclopedic than a vocational expert's information could ever be. For example, on the basis of the available sources, and surveys prepared for SSA by various state employment agencies, the regulations take notice of some 1600 different sedentary and light occupations that can be performed after a short demonstration or within 30 days, and that do not require any special skills. 20 C.F.R. Part 404, Subpart P, App. 2, Sections 200.00(b), 202.00(a). Similar data support the determinations about the effects of education, work experience, and age on the types and numbers of jobs open to claimants. 43 Fed. Reg. 55353-55355 (1978). Moreover, "[t]he regulations and Appendix 2 take appropriate account of the Social Security Administration's extensive experience * * * in administering disability programs." *Id.* at 55362.

By eliminating the need in many cases for the testimony of a vocational expert, the regulations also accomplish the twin efficiencies of reducing costs and hearing time. See page 34, *supra*. Of course they do not render altogether unnecessary the use of such testimony. It may still be required where the claimant suffers from a limitation, such as a mental or sensory impairment, unrelated to strength. See App. 2, Section 200.00(e); *Thomas* v. *Schweiker*, 666 F.2d 999, 1004 (5th Cir. 1982).[21] But it is un-

[21] Moreover, expert testimony may be desirable for deciding some difficult questions that can arise under the guidelines. One such issue is whether a particular claimant's skills are transferable to a relatively wide range of jobs. 20 C.F.R. 404.1566(e); *McCoy* v. *Schweiker*, *supra*, 683 F.2d at 1141 n.1. Compare App. 2, Table 1, Rule 201.14 with Rule 201.15.

doubtedly true that the current regulations represent a significant improvement—in uniformity, accuracy, and efficiency—over the former system for making disability determinations. See *Cummins* v. *Schweiker*, *supra*, 670 F.2d at 83 ("We think it was not only lawful * * *, but highly appropriate, for the Secretary to try to streamline the adjudication of Social Security disability cases and bring about some greater uniformity in the results of these adjudications * * * made by hundreds of different administrative law judges").

### III. The Medical-Vocational Regulations Are Procedurally Fair

The court of appeals did not challenge the accuracy of the job data embodied in the medical-vocational regulations. Rather, the court held that the Secretary could not rely exclusively on the regulations and Appendix 2 to direct a conclusion that respondent was not disabled because they failed " 'to achieve the underlying objectives of procedural fairness to the claimant and preservation of an adequate record for review' " (Pet. App. 10a, quoting *Decker* v. *Harris*, *supra*, 647 F.2d at 298). Respondent has echoed that contention (Br. in Opp. 6-11), which is based on a misunderstanding of the disability review process.

#### A. *The Guidelines Provide For Individualized Consideration Of All Facts Unique To Each Claimant's Case*

To understand the "procedural fairness" of the tables and guidelines in Appendix 2, it is important to comprehend the process that precedes their application. Appendix 2 does not even become relevant until the last stage of the sequential disability evaluation process. It must first be determined that the claimant is not currently working, has a severe

impairment (though not severe enough to be listed in Appendix 1), and is unable to perform work he has done in the past. The claimant is then given the opportunity to present, and to rebut, all relevant evidence bearing on his residual functional capacity—which determines which one of the tables will be consulted.[22] Similar consideration is given to a claimant's age (see J.A. 40), education (see *id.* at 42), and work experience (see *id.* at 44-47), which determine the appropriate rule to be consulted in the applicable table.[23]

The factual inquiry into each of those medical and vocational factors is not a perfunctory undertaking. Age, for example, usually is easily determined, but

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[22] "Light work" (the table applied in respondent's case), for example, is described as

> involv[ing] lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. * * * [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls.

20 C.F.R. 404.1567(b). At her hearing respondent introduced evidence on each of those facts. J.A. 21, 28-29, 31-33, 46-51. She was also instructed by the administrative law judge at the beginning of the hearing that he would "take * * * evidence on your residual functional capacity to engage in sedentary, light, medium, or heavy work. This essentially [is] * * * your ability to walk, stand, sit, lift, push, pull or carry." *Id.* at 37.

[23] The circuits that have upheld the regulations have recognized that an ALJ's decision is not supported by substantial evidence if it does not establish each of these factors. See, *e.g.*, *Spencer* v. *Schweiker*, 678 F.2d 42, 44-45 (5th Cir. 1982) (no substantial evidence supporting ALJ's conclusion that claimant could do sedentary work); *Dodgins* v. *Schweiker*, 681 F.2d 813 (4th Cir. 1982) (light work).

the regulations expressly state that age categories will not be applied "mechanically in a borderline situation." 20 C.F.R. 404.1563(a). When a claimant has (as respondent did not) skills acquired from prior work experience, the determination whether his skills are transferable (and so suit him for jobs other than those unskilled occupations underlying the tables) demands an inquiry into the degree of skill required in the other jobs, and the similarity of tools, machines, raw materials, products, processes, and services involved. 20 C.F.R. 404.1568(d)(2). In such cases, the regulations state that "we may use the services of a vocational expert or other specialist." 20 C.F.R. 404.1566(e); cf. *Vazquez* v. *Secretary of Health and Human Services*, 683 F.2d 1 (1st Cir. 1982). Education is analyzed with like flexibility. "[T]he numerical grade level that you completed in school may not represent your actual educational abilities." 20 C.F.R. 404.1564(b). Other information, such as hobbies, daily activities, and test results, are considered for the contributions they may make to "reasoning ability, communication skills, and arithmetical ability." 20 C.F.R. 404.1564(a).

Not only is there a detailed factual inquiry into the characteristics analyzed in the tables, but the regulations also specifically dictate that "a conclusion of disabled or not disabled" is not directed if a claimant's vocational and medical profile is not precisely contained in Appendix 2. 20 C.F.R. Part 404, Subpart P, App. 2, Section 200.00(a), (d); 20 C.F.R. 404.1569. For example, if the claimant has an impairment unrelated to physical strength, the tables cannot be used to deny benefits. 20 C.F.R. Part 404, Subpart P, App. 2, Section 200.00(e). Such impairments would include "mental, sensory, or skin" conditions; they also encompass "[e]nvironmental re-

strictions * * * which result in inability to tolerate some physical feature(s) of work settings * * *, e.g., an inability to tolerate dust or fumes." *Ibid.*[24] Similarly, if a claimant's impairment is exertional, but falls between the ranges indicated in the tables, the rules only offer guidance, not a fixed result. *Ibid.*[25]

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[24] In this case the administrative law judge specifically questioned respondent about the nonexertional impairments she might have. J.A. 39 ("If your case does not fall under a particular rule or you have some non-exertional impairments, the rule will be used as a frame of reference to determine whether you are disabled"), 40-41, 47-54 (Q. "You have told me just about your medical problem, have you not, as you understand it to be?" A. "I think so, sir. * * * I don't think I forget anything.")

Even the circuits that have upheld the regulations have been careful to find that the tables may not be used where a claimant has some significant nonexertional impairment. *Burnam* v. *Schweiker*, 682 F.2d 456, 458 (3d Cir. 1982); *McClenny* v. *Harris*, 681 F.2d 814 (4th Cir. 1982); *Thomas* v. *Schweiker*, *supra*, 666 F.2d at 1004 (sensitivity to dust, heat, fumes); *Roberts* v. *Schweiker*, 667 F.2d 1143, 1145 (4th Cir. 1981) (sensitivity to lint); *Torres* v. *Secretary of Health and Human Services*, 668 F.2d 67, 69 (1st Cir. 1981) (psychiatric impairment); *Cannon* v. *Harris*, 651 F.2d 513, 518-520 (7th Cir. 1981) (alcoholism); *Gagnon* v. *Secretary of Health and Human Services*, 666 F.2d 662, 666 n.8 (1st Cir. 1981) (pain).

[25] 20 C.F.R. Part 404, Subpart P, App. 2, Section 201.00(h) gives the following example:

> Example 1: An individual under age 45 with a high school education can no longer do past work and is restricted to unskilled sedentary jobs because of a severe medically determinable cardiovascular impairment (which does not meet or equal the listings in Appendix 1). A permanent injury of the right hand limits the individual to sedentary jobs which do not require bilateral manual dexterity. None of the rules in Appendix 2 are applicable to this particular set of facts, because this

### B. *A Claimant Need Not Be Given Notice And An Opportunity To Challenge The Suitability And Availability Of The Jobs Underlying The Tables*

The court of appeals expressed concern that a claimant be given notice and an

> "adequate opportunity to challenge the suitability or availability of the jobs noticed [in Appendix 2]."
>
> * * * Absent sufficient notice, the claimant is deprived of any real chance to present evidence showing that she cannot in fact perform the types of jobs that are administratively noticed by the guidelines.

(Pet. App. 10a, quoting *Decker* v. *Harris*, *supra*, 647 F.2d at 298). Respondent, perhaps aware of the indefensibility of that position, has argued that the Secretary's burden of specifying the types of jobs available is not an evidentiary requirement, but a way (albeit mandatory) of explaining "the critical factor of residual capacity" to claimants (Br. in Opp. 9-10). We have already demonstrated that this reading is inconsistent with what the court said, with what it has done subsequently, and with the understanding of other circuits that have interpreted the opinion. Pages 9-10, *supra*; Reply Br. 3-4. In any event, the positions taken by the court of appeals and respondent are both without merit.

1. It is entirely unnecessary to impose on the Secretary the duty—urged by respondent—of illustrat-

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individual cannot perform the full range of work defined as sedentary. Since the inability to perform jobs requiring bilateral manual dexterity significantly compromises the only range of work for which the individual is otherwise qualified (i.e., sedentary), a finding of disabled would be appropriate.

ing the meaning of residual functional capacity by identifying specific jobs a claimant could perform. The meanings of "sedentary," "light," and "medium" work—and of each other step in the disability determination process—are spelled out in the regulations. See 20 C.F.R. 404.1567. The Secretary has required that those regulations be made available to claimants at district and branch offices. 20 C.F.R. 422.430(a)(3). He has also required that claimants be allowed to inspect and copy such materials as the *Disability Insurance State Manual*, on which state agencies rely in making initial and reconsideration decisions. 20 C.F.R. 422.430(b)(4).[26]

Claimants are entitled to be represented at hearings, a fact of which respondent was repeatedly advised.[27] The regulations also impose on the administrative law judge an obligation "to develop a full and fair record, which * * * rises to a 'special duty . . . to scrupulously and conscientiously explore for all the relevant facts' where an unrepresented claimant has not waived counsel." *Broz* v. *Schweiker*, *supra*, 677 F.2d at 1364; 20 C.F.R. 404.944. The ALJ in this

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[26] We are informed by the Secretary that the Notice of Hearing sent to claimants is accompanied by Form HA-4607, which states that Appendix 2 will be considered in making the disability determination. Form HA-4607 also outlines the sequential disability evaluation process. The Form is reproduced in the Appendix to this brief.

[27] See, *e.g.*, J.A. 36:

> Q. All right. I might say this to you. If you want legal assistance or help and they are busy now, the case could be put off at a later time and whenever they could represent you. But if you want to go forward today and see what the evidence is and see if you need—need a representative, we are ready to do so.
>
> A. I'm willing to go forward.

case fully satisfied that obligation. See pages 38-40 and notes 22, 24 *supra*. He concluded that respondent retained "sufficient residual functional capacity for light work" (Pet. App. 25a). His decision was upheld by the Appeals Council (*id.* at 17a-18a), the district court (*id.* at 14a), and the court of appeals (*id.* at 7a). There is no reason to undo that determination simply because the ALJ failed to give the type of illustration that respondent now feels would have been most satisfactory. The regulations contain no such requirement. They are fully consistent with the statute, and it is not the judicial function to rewrite them.

2. The court of appeals seemed to suggest that the Secretary must prove the existence of particular jobs so that claimants may have an opportunity to show that such jobs do *not* exist (Pet. App. 10a, quoting *Decker* v. *Harris*, *supra*, 647 F.2d at 298 (emphasis added) (the claimant must have an "adequate opportunity to challenge the * * * *availability* of the jobs noticed' "). But where a claimant is—like respondent—capable of a full range of light work, the decision about the types and numbers of jobs that exist in the national economy is particularly unsuited to adjudication. As the Seventh Circuit recently noted (*Cummins* v. *Schweiker*, *supra*, 670 F.2d at 83):

> Such a judgment, to be well informed, requires a broad knowledge of the labor market. The Department of Health and Human Services has this knowledge and can both supplement and draw upon it in a rulemaking proceeding. It was entitled to substitute an institutional judgment for the *ad hoc* judgments of administrative law judges based on the testimony of vocational experts and other witnesses and on their own limited and variable knowledge of the labor market.

See also *Torres* v. *Secretary of Health and Human Services*, *supra*, 677 F.2d at 169. Unless the regulations rest on an incorrect factual basis—and neither respondent nor the court of appeals has suggested that they do—there are some 1600 types of unskilled jobs (*i.e.*, jobs that can be learned by one with minimal education and skills) that exist for people (like respondent) with no physical or mental limitations other than an inability to do more than light work. To afford individual claimants a chance to dispute that proposition in case after case would uselessly consume administrative and judicial resources and would destroy the utility of the guidelines. It was well established even before the medical-vocational regulations were promulgated that, in cases like respondent's where the claimant was able to do a full range of light work, the Secretary was entitled to dispense with proof of the fact that such work existed. *Breaux* v. *Finch*, 421 F.2d 687, 689-690 (5th Cir. 1970); Mashaw, *supra*, at 78-80.

3. Contrary to the court of appeals' assumption, the claimant is not precluded from showing that he "cannot in fact perform the types of jobs that are administratively noticed by the guidelines" (Pet. App. 10a). One of the primary functions of the guidelines is to provide a structure that will require the ALJ to elicit all relevant information about age, education, work skills, residual functional capacity, and nonexertional limitations insofar as they bear on a claimant's ability to do the types of work underlying the tables. Moreover, before the hearing the claimant will have seen the medical and other evidence upon which the initial and reconsideration denials of his claim rested (J.A. 37). The claimant is thus free to rebut that and any other contrary evidence concerning his medical and vocational characteristics. The

guidelines make this right explicit: "[E]ach of these findings of fact is subject to rebuttal and the individual may present evidence to refute such findings." 20 C.F.R. Part 404, Subpart P, App. 2, Section 200.00(a).

The information that the claimant is asked to supply is not, of course, targeted at specific occupations. But in the class of cases to which the guidelines apply, that focus is unnecessary. Take respondent's situation as an illustration. What the ALJ found was that she was able to perform a wide range of unskilled light work (Pet. App. 27a) that could be undertaken "after a short demonstration or within 30 days, and [that does] not require special skills or experience." 20 C.F.R. Part 404, Subpart P, App. 2, Section 202.00(a). It was shown above (page 31) that a claimant's ability to perform light work (his exertional capacity) was not a matter about which the vocational expert testified. In that regard the guidelines effect no change from the prior system. On the other hand, it would be pointless to allow extended proof of the ways in which respondent was uneducated or unskilled, since the approximately 1600 jobs noticed in the tables presume that the claimant has no skills, and only minimal literacy and the ability to communicate in English. 20 C.F.R. 404.1564 (b)(1) to (3); App. 2, Table 2, Rules 202.09, 202.10. It *would* be possible for a claimant to show that he could not perform many of the jobs noticed in Table 2 because he had nonexertional limitations—*e.g.*, an allergy to dust. But in cases (unlike respondent's) where such limitations are present, the guidelines can no longer be used to direct a conclusion of nondisability. See pages 39-40, *supra*.

The court of appeals stated (Pet. App. 10a) that "[i]f there are so many types of jobs available, it would not be too great a burden for the Secretary or the ALJ to specify a few suitable alternative available types of jobs so that a claimant is given an opportunity to show that she is incapable of performing those jobs." But to review, one by one, the approximately 1600 jobs underlying the table applicable to respondent's case, and permit her to introduce evidence about her inability to perform each of them, would be an utterly fruitless investment of administrative resources. The very point of the guidelines is to obviate the need for such an inquiry. Once a claimant's medical and vocational characteristics have been thoroughly reviewed, then, unless the data on which the guidelines are based are seriously deficient (a point not contended in this case), it is clear that he *can* perform a full range of the jobs incorporated in the applicable table.

4. The court of appeals' conclusion that respondent should be allowed to dispute the availability and suitability of particular occupations not only interjects a superfluous procedure into disability hearings, but also rests on a mistaken perception of the disability determination process. The statutory term "disability" is not a historical fact that can only be ascertained on a case-by-case basis.[28] *Cummins* v. *Schweiker*, *supra*, 670 F.2d at 83. Its implementation involves in the first instance a judgment about what kind of impairments—coupled with what age, educational, and vocational characteristics—render claim-

[28] The disability insurance system should not be confused with unemployment compensation. The issue in disability cases is not whether the claimant has sought and been unable to find a job.

ants sufficiently unable to work that they are entitled to benefits. Congress has delegated to the Secretary the responsibility of making specific the relevant medical and vocational factors, and he has done so by the regulations at issue here. "The administration of public assistance based on the use of [such] a formula is not inherently arbitrary. There are limited resources to spend on welfare. To require individual determinations of need would mandate costly fact-finding procedures that would dissipate resources that could have been spent on the needy. Sometimes, of course, Congress has required individualized findings of fact. In this case, however, the Act and legislative history make clear that Congress" both authorized and approved the Secretary's decision to proceed by general rule. *Schweiker* v. *Gray Panthers*, *supra*, 453 U.S. at 48 (citations and footnotes omitted).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1982

## APPENDIX

### ATTACHMENT TO NOTICE OF HEARING

### GENERAL INFORMATION

In order to decide whether you are disabled, the Administrative Law Judge is required by Regulations No. 4 and No. 16 of the Social Security Administration to consider the following:

1. Whether you are actually engaging in substantial gainful activity and, if not:
2. Whether your impairment or impairments restrict your ability to perform work-related functions so as to render you disabled; i.e., your impairments are of a level of severity which meet or are equal to an impairment listed in Appendix 1 of Subpart P of the Regulations No. 4; or
3. If your impairments do not meet the level of severity in the listings but are severe, whether they prevent you from doing your usual or customary work and, if so;
4. Whether you can perform any other substantial gainful work which exists in the national economy in significant numbers, considering your age, education, and work experience.

The rules set out in Appendix 2 of Subpart P of Regulations No. 4 will be considered in determining whether you are disabled. In addition, any nonexertional impairments will be taken into consideration.

The above findings will be made based on the evidence, including testimony taken at the hearing. The Administrative Law Judge will be inquiring fully into the severity of your impairments, how they af-

fect your ability to perform work-related functions, the physical and mental demands of your past work, your formal and acquired educational skills, and your age. To facilitate such inquiry you should bring any additional medical evidence you have to the hearing (if you cannot forward the evidence at least five days prior to hearing); be prepared to explain how your impairments affect your ability to function; and provide information on the physical and mental demands of your prior work.

After obtaining all necessary information, the Administrative Law Judge will study the record and issue a written decision.

Form HA-4607 (2-80)
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# Respondent's Brief

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No. 81-1983

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, *Petitioner*,

v.

CARMEN CAMPBELL, *Respondent*.

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## QUESTION PRESENTED

Did the Court of Appeals err in remanding the Social Security disability case of an unrepresented and uneducated claimant because the Secretary had failed to give the claimant adequate notice and an opportunity to present evidence about her physical and vocational limitations before applying the medical-vocational guidelines?

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## STATEMENT

The Secretary of Health and Human Services ("Secretary") construes this case as a challenge to the validity of his medical-vocational regulations for determining disability ("the grid", 20 C.F.R. Part 404, Subpart P, App. 2). Respondent Carmen Campbell never challenged the validity of the regulations below and does not do so here. The Court of Appeals did not invalidate the regulations explicitly or implicitly. Respondent agrees that the Secretary "in appropriate cases may rely upon published medical-vocational guidelines, rather than testimony of vocational experts, to determine the existence of substantial gainful work in the national economy for disability claimants under the Social Security Act." (Pet. Br. at i).

In his brief, the Secretary emphasizes that "[i]t is only after [a] detailed and individualized factual inquiry into a claimant's medical and vocational characteristics that the guidelines and tables in Appendix 2 come into play," (Pet. Br. at 6), and only "if claimant's vocational and medical profile is . . . precisely contained in Appendix 2." (Pet. Br. at 39). The Secretary thus agrees that the medical-vocational guidelines can be used only where they apply by their own terms and only after he has made adequate findings of fact as to a claimant's individual medical and vocational capacities.

The Court of Appeals remanded this case because the Secretary failed to give an unrepresented and uneducated disability benefits claimant adequate notice of the factors to be considered in applying the regulations, thereby depriving Mrs. Campbell of the opportunity to testify about her medical and vocational capacities to perform jobs other than domestic work. The Court of Appeals directed the Secretary to provide Mrs. Campbell with examples of jobs in the job categories he thought would be appropriate for her as a way of informing her of the nature of the factual findings required by the grid, so that she would be able to testify meaningfully about them.

The Court of Appeals' requirement of a listing of job examples is simply one reasonable, non-burdensome method by

which the Secretary can partially fulfill his duty to notify claimants of the factual issues on which they are entitled to present evidence before the grid can be used to make a final disability determination. This requirement does not invalidate the grid or render it useless; it merely aids in its application.

**Proceedings Below**

This is a conventional appeal from the denial of disability insurance benefits under Title II of the Social Security Act pursuant to 42 U.S.C. § 405(g). Under Title II an "insured individual" (a person who has worked long enough in employment covered by the Act) is eligible for benefits if he has a "disability," that is, if "his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience engage in any other kind of substantial gainful work which exists in the national economy . . ." 42 U.S.C. § 423(d)(2)(A).

Respondent applied for disability insurance benefits in October, 1979, at age 51, alleging disability because of a herniated lumbar disc and hypertension. (Pet. App. 2a). She has a sixth grade education obtained in Panama. (Pet. App. 3a). She testified at her hearing that she could understand English, her second language, "fairly well" (J.A. 42) although the transcript of the hearing indicates she had some difficulties expressing herself. (See, e.g., J.A. 43-45). Mrs. Campbell's entire relevant work history consisted of domestic work, as the Secretary found. (Pet. App. 28a). She worked primarily as a maid, first in private homes and then in a hotel. (J.A. 45-46).

Respondent's claim was denied on the ground that "claimant maintains the capacity to perform her past work as a maid." (J.A. 27). Respondent then requested a hearing, held before an Administrative Law Judge ("A.L.J.") on August 22, 1980.

The medical evidence in the record includes a series of letters from the surgeon who performed a laminectomy on Mrs. Campbell's back. These letters are formulated in terms of Mrs.

Campbell's ability to return to her chambermaid job. For example, a letter dated May, 1979, states that Mrs. Campbell could go back to work in June if she avoided lifting "heavy" objects or "strenuous" work. (J.A. 8-9). A letter dated July, 1979, states that Mrs. Campbell complained of pain but "may return to light duty work." (J.A. 11). Another letter dated November, 1979, reports that Mrs. Campbell had pain, numbness, needles sensation, limitation of back movement and restricted leg raising. The surgeon states that Mrs. Campbell "is disabled from doing her regular work, and should avoid lifting heavy objects and strenuous work." (J.A. 55). The surgeon does not define "light," "heavy" or "strenuous."

The record also includes the reports of Mrs. Campbell's physiatrist,[1] who states that the claimant's sitting tolerance was 30 minutes, standing tolerance was 1 hour, walking tolerance was two blocks, and lifting and carrying was restricted to a maximum of 10 pounds. (J.A. 28, 32-33).[2]

The A.L.J. issued a decision on September 26, 1980, in which he attempted to follow the five steps for evaluating disability set forth in detail at 20 C.F.R. § 404.1520, *et seq.* First, the A.L.J. found that Mrs. Campbell was not working. 20 C.F.R. § 404.1520(b). Second, he found that her impairment was "se-

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[1] A physiatrist is a doctor of medicine specializing in physical therapy and rehabilitation.

[2] The balance of the medical evidence consists of the records of the Brooklyn Hospital, which state that Mrs. Campbell has been receiving pelvic traction treatment for her lumbar spine since 1973. The hospital records show that on January 10, 1979, Mrs. Campbell underwent a laminectomy in which two herniated discs were removed. Although she still complained of pain on walking she was discharged on January 27, 1979. (Tr. 86-94).

(References to those portions of the transcript of the administrative record not included in the appendixes, but filed with the Court, are indicated by "Tr").

vere": that it "limited her physical or mental ability to perform basic work activities." 20 C.F.R. § 404.1520(c). Third, he found that her impairment was not as severe as those listed in Appendix 1 of the regulations, 20 C.F.R. Part 404, Subpart P, which would entitle a claimant to benefits regardless of her age, education or vocational characteristics. 20 C.F.R. § 404.1520(d). Fourth, he found she could not perform her past work. 20 C.F.R. § 404.1520(e).

The parties agree that the A.L.J.'s decisions on these first four steps were correct. The dispute is about the fifth step, in which the A.L.J. had to decide whether Mrs. Campbell could, considering her impairments, age, education and work history, perform other work in the national economy. The A.L.J. applied the medical-vocational guidelines in the regulations to decide the question of alternative work. These regulations include tables which indicate whether jobs exist in the national economy for claimants who are categorized by age, education and work experience; who have only strength-related limitations; and who retain the residual exertional capacity to perform moderate, light, or sedentary work.

At the start of the hearing, the A.L.J. made an introductory statement which included the following:

> I will be taking evidence as to the severity and the expected duration of your impairments, whether your impairments are of such severity as to prevent the performance of your past relevant work, and whether you have the residual capacity to perform other types of work taking into account your age, education and work history. There is a lot of instances that we can take in evidence [sic] on your residual functional capacity to engage in sedentary, light, medium, or heavy work. This essentially, what we're taking into account, your ability to walk, stand, sit, lift, push, pull or carry.
>
> I will take evidence and consider any mental, skin, sensory or environmental impairment that might limit your capacity to work. (J.A. 37).

The A.L.J. did not explain what he meant by "residual capacity" or by "sedentary, light, medium or heavy work." (J.A. 37).

Mrs. Campbell, who was unrepresented, described her duties as a maid and explained why she was no longer able to perform these duties. (J.A. 44-49). The A.L.J. did not ask a single question relating to Mrs. Campbell's capacity to perform work other than domestic work and she did not testify about it. The A.L.J. did not ask Mrs. Campbell to describe how long she could sit or stand or how much she could lift or carry or whether she had any allergies or mental problems. In fact, on the two occasions when Mrs. Campbell attempted to describe the limitations in her exertional abilities, the A.L.J. changed the line of her testimony. (J.A. 50).

The A.L.J. found that 20 C.F.R. Part 404 Subpart P, App. 2, Rule 202.10 (the grid rule) "dictates a finding that the claimant is not 'disabled.' " (Pet. App. 27a). This rule does in fact require a finding of no disability for an individual age 51 (defined by the regulation as closely approaching advanced age), with a sixth grade education (categorized by the regulation as marginal education), a history of unskilled work, the exertional capacity for light work and no significant non-exertional limitations.

The A.L.J.'s decision became the final decision of the Secretary upon its adoption by the Appeals Council. (Pet. App. 16a-19a). Mrs. Campbell then sought judicial review in the United States District Court for the Eastern District of New York. Although the District Court Judge stated that "eventually she is going to be able to prove a disability. There is no question in my mind . . . I would start a whole new record with this last letter from the doctor and you are in good shape,"[3] he dismissed the complaint on the ground that the determination of the Secretary was supported by substantial evidence. (Pet. App. 12a).

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[3] Transcript of the April 20, 1981 status conference, p.5. This transcript was filed with the Court of Appeals.

The District Judge referred to the surgeon's letter dated November, 1979, which had in fact been received into evidence and considered by the Appeals Council. (J.A. 55).

Mrs. Campbell then appealed to the Court of Appeals for the Second Circuit. The Court of Appeals remanded the case for further proceedings, holding that Mrs. Campbell had been deprived of adequate notice of the determinative issue at her hearing, her ability to perform alternative jobs existing in the economy. The Court said,

> our major concern is that the claimant be given adequate notice of the nature and demands of the types of jobs allegedly available. Absent sufficient notice, the claimant is deprived of any real chance to present evidence showing that she cannot in fact perform the types of jobs that are administratively noticed by the guidelines . . . it would not be too great a burden for the Secretary or the ALJ to specify a few suitable alternative available types of jobs so that a claimant is given an opportunity to show that she is incapable of performing those jobs.
>
> Moreover, we stress that the jobs should be specified at the hearing so that the claimant has a chance to put evidence into the record on that issue.

*Campbell* v. *Secretary of H.H.S.*, 665 F.2d 48, 53-54 (2d Cir. 1981). Rehearing *en banc* was denied by the Court of Appeals on February 11, 1982. (Pet. App. 30a-31a).

Mrs. Campbell, still insured under the Act, filed a second application for disability benefits in February, 1981. The reapplication was denied initially and upon reconsideration, and Mrs. Campbell requested a hearing which was held before an A.L.J. on March 17, 1981. Due to the pendency of the instant proceeding, Mrs. Campbell agreed, at her hearing, to change the alleged date of onset of disability to January 1, 1981. On April 28, 1982, the A.L.J. issued a decision finding that at least as of January 1, 1982, Mrs. Campbell was not only unable to perform her past work, but incapable of performing any substantial gainful activity.[4] Thus, the remaining issue is Mrs. Campbell's entitlement to retroactive benefits.

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[4] The Secretary's claim in his brief that the second application was granted "on the basis of a change in her condition" (Pet. Br. at 8 fn. 7) is unfounded. While Mrs. Campbell, represented by counsel at the

## SUMMARY OF ARGUMENT

1. Claimants have the burden of proving that they are eligible for disability benefits, but once they prove they are unable to perform their past jobs, the burden of going forward shifts. The Secretary must then prove that there are other jobs that the claimants can perform. The Secretary may take administrative notice, through the "grid", of the existence of jobs for people with certain capacities, but he must make individualized findings of fact concerning the actual capacities of the particular claimant.

2. In order to obtain the evidence necessary to make these findings of fact, the Secretary must meaningfully inform the claimant of the issues to be addressed at the hearing. The duty to inform the claimant of the issues arises from the Social Security Act and regulations. The Secretary has an obligation, based on the regulations and on virtually unanimous case law to aid the claimant in presenting all the relevant evidence. The need for meaningful notice arises also from the constitutional guarantee of due process of law. The notice must be reasonably calculated to enable claimants to understand the issues.

3. The listing of job examples prescribed by the Court of Appeals is an appropriate way for the Secretary to provide the required notice. Job examples help notify claimants of the relevant job requirements: both the exertional and vocational factors incorporated in the grid and the non-exertional factors which limit the grid's applicability. Mrs. Campbell was not informed of the need to testify about either exertional or non-exertional impairments.

4. The grid regulations themselves do not provide adequate notice to claimants of the issues to be determined at the

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second hearing, submitted additional medical evidence of her back impairment and the resulting emotional overlay, there was no evidence or finding of a *change* in her condition. The decision after the second hearing is annexed hereto as App. 1.

hearing. Notice must be tailored to the individuals receiving it. These regulations are complex, available only to those able to travel, and they do not include an adequate explanation of their boundaries or actual examples of jobs. They are not meaningful notice for disabled, often unrepresented and poorly educated claimants.

5. The requirement that the A.L.J. give a list of job examples does not make the grid useless. The A.L.J. does not have to cite jobs particularly suited to the individual claimant; the listing of jobs is meant only to illustrate some of the requirements of the relevant grid job category in order to inform the claimant in a meaningful way of the issues to be determined. The testimony of vocational experts will not be required.

## ARGUMENT

## THE COURT OF APPEALS CORRECTLY HELD THAT THE SECRETARY'S FAILURE TO GIVE MRS. CAMPBELL EXAMPLES OF THE JOBS HE ALLEGED WERE AVAILABLE TO HER DEPRIVED HER OF MEANINGFUL NOTICE OF THE ISSUES TO BE TRIED AT THE HEARING.

### A. The Regulations And Caselaw Require Individualized Proof Of Claimants' Medical And Vocational Characteristics.

Individuals claiming disability benefits have the burden of proving that because of a physical or mental impairment they are unable to do their previous work or any other substantial gainful work which exists in the national economy. 42 U.S.C. § 423. Once claimants show that they cannot return to their former work, however, the burden shifts to the Secretary to establish that claimants can engage in alternative employment and that other jobs actually exist. *Kerner* v. *Flemming*, 283

F.2d 916 (2d Cir. 1960).[5] This shift is necessary because the Secretary has greater knowledge of both existing jobs and the capacities needed to perform them; without the shift claimants would have the impossible task of proving their incapacity to do every other conceivable job. This judicial rule was implicitly approved by Congress, which left it unchanged when amending the definition of disability in the Social Security Act. See P.L. 90-248, 81 Stat. 821, the 1967 amendments.

Under the rule the Secretary's burden is twofold:

> First, he must show that claimant, considering his age, his education, his work experience, his skills and his physical shortcomings, has the capacity to perform an alternative job. Second this job must be shown to exist in the national economy.

*McLamore* v. *Weinberger*, *supra*, 538 F.2d at 574.

Even before the grid regulations were promulgated, courts recognized that the Secretary could meet these two requirements in different ways. The Secretary could take administrative notice of the existence of and requirements for certain jobs, but he was required to base his decision upon individualized proof of a claimant's capacities to work:

> while this and other circuits have agreed that the Secretary may administratively notice the *existence* of such jobs in the economy, facts pertaining to the capacity of a specific individual can be supplied only be particularized proof.

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[5] This has been the consistent holding of Courts of Appeals. See, e.g., *Parker* v. *Harris*, 626 F.2d 225, 231 (2d Cir. 1980); *Hall* v. *Secretary of Health, Education and Welfare*, 602 F.2d 1372, 1375 (9th Cir. 1979); *Hephner* v. *Mathews*, 574 F.2d 359, 362 (6th Cir. 1978); *Small* v. *Califano*, 565 F.2d 797, 800 (1st Cir. 1977); *Garrett* v. *Richardson*, 471 F.2d 598 (8th Cir. 1972); *McLamore* v. *Weinberger*, 538 F.2d 572, 574 (4th Cir. 1976); *Lewis* v. *Weinberger*, 515 F.2d 584, 587 (5th Cir. 1975); *Stark* v. *Weinberger*, 497 F.2d 1092, 1098 (9th Cir. 1974); and *Meneses* v. *Secretary of Health, Education and Welfare*, 442 F.2d 803, 807 (D.C. Cir. 1971).

> See *Hernandez* v. *Weinberger*, [493 F.2d 1120 (1st Cir. 1974)]; 2 K. Davis, Administrative Law § 15.03 at 353 and § 15.10 at 403 (1958). To allow the Secretary to "notice" a fact that is both complex and disputed would undermine an explicit congressional direction to adjudicate disability claims on an individual case-by-case basis.

*Taylor* v. *Weinberger*, 512 F.2d 664, 668 (4th Cir. 1975). See also, *Geoffroy* v. *Secretary of H.H.S.*, 663 F.2d 315, 317 (1st Cir. 1981).

The Secretary promulgated the grid regulations in the context of this body of law.

> In publishing the amendments, the Department intends to consolidate and elaborate upon long standing medical-vocational evaluation policies for adjudicating disability claims in which an individual's age, education, and work experience must be considered in addition to the medical condition.

43 Fed. Reg. 55349 (Nov. 28, 1978). The purpose of the grid is to provide consistency in showing the existence of alternative work for claimants. The only automatic function of the grid is to take administrative notice of the existence of jobs in the national economy that can be performed by individuals with stated capacities. It does not obviate the need for individualized proof of all the facts needed to determine an individual's capacities.

### B. Mrs. Campbell Was Entitled To Meaningful Notice Of The Issues To Be Decided In Applying The Guidelines Under The Social Security Act And The Due Process Clause Of The Fifth Amendment.

The Secretary does not dispute that to use the grid properly he must first make specific findings regarding each factor that will be used in applying the grid. (Pet. Br. at 44-45). The Secretary cannot obtain all the evidence concerning these individual characteristics unless he meaningfully informs claimants about the factors he will consider.

> Unless the ALJ informs a claimant at an early stage of the proceeding that the Guidelines may be used to determine

> disability, and that the claimant has a right to introduce evidence on the criteria of age, education, work experience, and RFC [residual functional capacity], as those elements are defined in the Guidelines and by this opinion, it may be difficult for a claimant to have a realistic opportunity to present his case.

*McCoy* v. *Schweiker*, 683 F.2d 1138, 1147 (8th Cir. 1982). The right to notice that will enable claimants to testify on all relevant issues is clear from the Social Security Act itself, which provides that in determining disability the Secretary "shall give . . . reasonable notice and opportunity for a hearing . . . and . . . shall on the basis of evidence adduced at the hearing, affirm, modify or reverse . . ." 42 U.S.C. § 405(b). Similarly the regulations mandate an opportunity to testify. 20 C.F.R. § 404.950.

In fact, both the regulations and the caselaw impose on the Secretary an obligation to go beyond classic pre-hearing notice. The regulations at 20 C.F.R. § 404.944 require the ALJ to "look[ ] fully into the matter at issue . . . [and] question[ ] [the claimant] and other witnesses . . ." Bearing in mind that the Secretary "operates essentially and is intended to do so, as an adjudicator and not as an advocate or adversary," *Richardson* v. *Perales*, 402 U.S. 398, 403 (1971), most Courts of Appeals have held that, especially where the disability claimant appears at his hearing without counsel, the ALJ's duty to develop the record rises to a special duty "to scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts . . ." *Hennig* v. *Gardner*, 276 F.Supp. 622, 624 (N.D. Tex. 1967), quoted approvingly in *Gold* v. *Secretary*, 463 F.2d 38, 43 (2d Cir. 1972); *Smith* v. *Secretary*, 587 F.2d 857, 860 (7th Cir. 1978); *Cox* v. *Califano*, 587 F.2d 988, 991 (4th Cir. 1978); *Diablo* v. *Secretary*, 627 F.2d 278, 281-282 (D.C. Cir. 1980); *Walker* v. *Harris*, 642 F.2d 712, 714 (4th Cir. 1981); *Ware* v. *Schweiker*, 651 F.2d 408, 414 (5th Cir. 1981); *Cowart* v. *Schweiker*, 662 F.2d 731, 735 (11th Cir. 1981). See also, *Figueroa* v. *Secretary*, 585 F.2d 551, 554 (1st Cir.

1978); *Dobrowolsky* v. *Califano*, 606 F.2d 403, 407-408 (3rd Cir. 1979).

> This duty of inquiry on the ALJ would include, in a case decided under the grids, a duty to inquire into possible . . . impairments and into . . . limitations . . . that prevent a full range of work.

*Broz* v. *Schweiker*, 677 F.2d 1351, 1364 (11th Cir. 1982).

The ALJ must actively help the claimant present the relevant evidence. To do that he must inform the claimant of what evidence will be relevant. Thus, if he intends to use the grid he must tell the claimant what factors he will make decisions about.

The right to notice is also premised on the Fifth Amendment's guarantee of due process of law. The interest of an individual in receiving Social Security disability benefits "is a statutorily created 'property' interest protected by the Fifth Amendment." *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976), and the cases cited therein.[6] Thus, in a Social Security disability case, this Court expressly held that

> procedural due process is applicable to the adjudicative administrative proceeding involving "the differing rules of fair play, which through the years, have become associated with differing types of proceedings," *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960); . . .

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[6] The medical-vocational regulations govern the determinations of disability under the Supplemental Security Income ("S.S.I.") program, 42 U.S.C § 1381, *et seq*. See, 20 C.F.R. § 416.969. The S.S.I. program provides "subsistence" benefits to financially eligible disabled, aged or blind persons. Thus, due process requirements are applicable to determinations of S.S.I. eligibility under *Goldberg* v. *Kelly*, 397 U.S. 254 (1972).

*Richardson* v. *Perales*, *supra*, 402 U.S. at 401. There the Court found that written medical reports were admissible precisely because,

> [n]otice was given to claimant Perales. . . . And the authors of those reports were known and subject to subpoena . . .

402 U.S. at 407. The fundamental requirement of due process

> is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

*Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted).

"It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protection as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The notice required by the Second Circuit is fully appropriate in the context of disability determinations in which the grid may be used. It places the

> emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of the Congress so long as the procedures are fundamentally fair.

*Richardson* v. *Perales*, *supra*, 402 U.S. at 400-401.

The gravamen of the Second Circuit's opinion was to require the Secretary to give Mrs. Campbell meaningful notice of the factors to be determined before application of the grid.[7]

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[7] The Second Circuit ruled that Mrs. Campbell did not have a procedurally fair hearing because she was not given adequate notice of the issues to be determined. The court suggested that a simple, direct means of giving meaningful notice would be to give the

### C. The List Of Job Examples Required By The Second Circuit Is Meaningful Notice Reasonably Calculated To Advise Claimants Of The Issues To Be Determined In Applying The Grid.

Before an A.L.J. can make a final determination on disability using the grid, he must make findings of fact about the claimant's residual functional capacity (physical strength or exertional ability) and about the claimant's non-exertional limitations.[8] Since the grid considers only the effect of exertional limitations upon a claimant's ability to engage in alternative employment, it does not fully apply if the claimant has any significant limitation not related to strength. 20 C.F.R. Part 404, Subpart P, App.2, § 200.00(e).[9] Thus, the A.L.J.

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claimant examples of the jobs she might be found able to do. Even if this Court disagrees with the Second Circuit's particular remedy, it should nonetheless affirm that part of the Court of Appeal's decision remanding the case for a new hearing so that Mrs. Campbell may be given an opportunity to present all her relevant evidence.

[8] The other areas of inquiry concern the claimant's vocational factors: (chronological) age, (formal) education, and work experience. There may be special circumstances which complicate the assessment of these factors: for example, borderline age (20 C.F.R. § 404.1563(a)), education completed long ago (20 C.F.R. § 404.1564(b)), or an issue of transferability of skills (20 C.F.R. § 404.1568). Notice which would trigger testimony about these circumstances is needed in certain cases; the job examples alert claimants to testify about them.

[9] This provision prevents mechanical application of the grid to claimants who present work adjustment problems which are not factored into the grid. The Secretary emphasizes this limitation. See, Pet. Br. at 40, n.24. In fact, several courts have specifically relied on the flexibility that results from this provision in upholding the legality of the grid under the statute. See, *Santise* v. *Schweiker*, 676 F.2d 925, 934-935 (3rd Cir. 1982); and *Kirk* v. *Secretary*, 677 F.2d 524, 528-529 (6th Cir. 1981).

must determine whether or not the claimant has significant non-exertional limitations before applying the grid.

To determine non-exertional limitations, the Secretary must assess a multiplicity of interrelated factors. The regulations do not contain a complete list of non-exertional limitations; they cite mental, skin, and sensory impairments, but these are only examples from a potentially endless list.[10] 20 C.F.R. Part 404 Subpart P, App. 2 § 200(e).

Because the regulations do not contain a definition or even a comprehensive list of non-exertional impairments, the Secretary cannot meaningfully notify claimants about this issue by reference to the regulations. The A.L.J. can not rely on the regulations to frame questions which would elicit all possibly relevant testimony from the claimant. Therefore, the Second Circuit suggested that the ALJ provide the claimant with a list of examples of some of the jobs contemplated by the grid as a way of eliciting such testimony.

The Court of Appeals suggested that the ALJ should say, for example,

> if I decide that you are capable of 'sedentary' work, that will mean that I am deciding that you could operate a pinking machine in a garment factory or that you could cut

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[10] For example, in evaluating mental impairments, consideration must be given to claimant's "ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, co-workers, and work pressures in a work setting." 20 C.F.R. § 404.1545(c). If claimant establishes a significant limitation in terms of one of these factors, she has established a non-exertional impairment, and the grid is not fully applicable to her. *See, e.g., Torres* v. *Secretary, of Health and Human Services*, 668 F.2d 67,69 (1st Cir. 1981). Likewise, if the claimant establishes the presence of significant pain, the claim may not be decided by exclusive reliance on the grid because pain imposes a limitation not considered by the grid. *Gagnon* v. *Secretary of Health and Human Services*, 666 F.2d 662, 665-666 (1st Cir. 1981).

clippings from newspapers for a business service. Are there any reasons why you could not do those jobs or others like them?"

Such examples of appropriate jobs would provide meaningful notice, reasonably calculated to apprise disability claimants of some of the issues to be decided by the A.L.J.[11] They would raise in the claimant's mind a picture of real jobs, in real factories or warehouses, with real working conditions, requiring continued presence, interaction with co-workers, and particular kinds of effort. It is not a flawless notice, and by itself it would certainly not advise claimants of all the issues to be

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[11] The Secretary argues that the job examples could not be intended merely as notice of the issue of the claimant's capacities because the Court of Appeals found that there was substantial evidence to support the finding that Mrs. Campbell had the exertional capacity to do light work. Thus, the Secretary argues, the list of job must be meant to give the claimant an opportunity to contest the existence or availability of the jobs, which is the only remaining issue. (Pet. Br. 9, 41). However, the finding of capacity concerned only Mrs. Campbell's exertional capacities and not all the factors of Mrs. Campbell's grid profile. A final decision must be based upon, *inter alia*, specific findings about claimant's non-exertional limitations. Mrs. Campbell's record is devoid of any such findings. Cf. *Torres* v. *Secretary of Health and Human Services*, *supra*, 668 F.2d at 69.

More importantly, the Secretary confuses the issue of the existence of substantial evidence with the issue of procedural fairness. On judicial review of disability decisions, 42 U.S.C. § 405(g), the courts must determine not only the substantiality of the evidence underlying the administrative findings, but also the fairness of the procedures followed. See, H.R. Rep. No. 96-100, 6th Cong. 1st Sess. 12 (1979). Thus, it is not unusual for courts to remand cases, even if they agree that based on the available evidence the Secretary's decision is supported by substantial evidence, so that claimants can receive the full panoply of procedural rights before final decisions are made on their claims. See *McLaughlin* v. *Sec. of H.E.W.*, 612 F.2d 701 (2d Cir. 1980); *Cutler* v. *Weinberger*, 516 F.2d 1282 (2d Cir. 1975).

considered. But if the claimant knew that she had to testify as to all the reasons why she could not perform such a list of jobs, she would be very likely to testify about the kind of problems that might make those jobs impossible for her.

In Mrs. Campbell's case, she was never notified that her ability to do alternative work was an issue or that this issue would be determined by application of the grid unless a significant non-exertional limitation was established and that she should therefore present proof of any non-strength limitations. As a result, Mrs. Campbell did not emphasize the limitations imposed by her pain.[12] Nor did she testify about other non-exertional impairments suggested by the record, including an emotional problem,[13] a postural problem evidenced by the use of a brace (Tr. 43), the possible secondary effects of her medications (J.A. 51-22), or her need to lie down during the day (J.A. 32). Thus, the record does not include available evidence of her non-exertional impairments, highly relevant to application of the grid.

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[12] The A.L.J. ultimately found that while Mrs. Campbell suffered from some pain and although "it may well be that claimant has episodes of annoyance because of a particular condition, that factor alone does not create entitlement to disability benefits where the record otherwise indicates that the capacity to engage in substantial gainful activity persists." (Pet. App. 26a). However, pain, although not disabling by itself, can impose nonexertional limitations which would make the grid inapplicable, as in *Gagnon* v. *Secretary*, *supra*, 666 F.2d at 665.

[13] Mrs. Campbell mentioned that her sleep was poor (J.A. 41, 51), that she takes Valium "for her nerves" (J.A. 51), and that she had extremely strained family relations and problems with coworkers (J.A. 43, 47, 58). The importance of this emotional impairment is suggested by the fact that Mrs. Campbell's subsequent application was granted upon the finding of a severe back impairment with an emotional overlay. See, App. 1, annexed hereto.

Once the A.L.J. decides that a claimant has no significant non-exertional limitations, he must determine the extent of claimant's exertional limitations in order to apply the grid. The regulations specifically define categories of work available to persons with the "residual functional capacity" to do light, medium, or sedentary work. Each category is defined specifically in terms of strength requirements.[14] The findings about claimant's ability to meet each strength requirement have a critical effect on the ultimate disability decision. For example, a finding that a claimant can lift a maximum of 10 pounds would limit her to sedentary work; if the maximum lifting capacity is 20 pounds she would be found capable of light work. This categorical determination of claimant's exertional capacity is usually the controlling factor in disability cases decided under the grid.[15]

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[14] For example, sedentary and light work are defined as follows:

(a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

(b) Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighting up to 10 pounds. Even though the weight lifted may be very little a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling or arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. § 404.1567.

[15] See, Goldhamer, *The Effect of the New Medical Vocational Guidelines on Social Security and Supplemental Security Income Claims*, 32 Ad. L. Rev. 50], 509 (1980).

The A.L.J. can, and should, ask the claimant directly about her ability to meet each strength requirement. "How many pounds can you lift? How long can you sit continuously? How far can you walk?" and so forth. Even though these are specific questions, they are not sufficient because most people do not know in the abstract how many pounds they can lift. The listing of jobs prescribed by the Courts of Appeals can provide claimants with a concrete idea of the context and meaning of the questions about their levels of tolerance for specific exertional activity.

Mrs. Campbell's experience illustrates well the need to give notice of examples of jobs. She was denied benefits originally because the Secretary determined that she "could resume her job as a maid." (J.A. 27). She requested a hearing to contest this determination and came to the hearing prepared to discuss her inability to do hotel chambermaid work. The medical evidence which she presented was formulated almost entirely in terms of her ability to return to her prior job.[16] Mrs. Campbell testified about her inability to do her old job and indeed established that she was unable to perform the duties required by maid work. Mrs. Campbell, however, was not asked and did

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[16] The only report formulated in terms of Mrs. Campbell's specific levels of tolerance for exertional activities is the report of the physiatrist, which states that Mrs. Campbell can continuously stand 30 minutes, sit 30 minutes, lift up to 10 pounds, and carry up to 10 pounds. (J.A. 32). This report, if accepted, would indicate that Mrs. Campbell is limited to sedentary work as defined in 20 C.F.R. § 404.1567(a) and therefore that she is "disabled."

In fact, the only evidence that Mrs. Campbell could perform "light" work was the statement of a surgeon, who never defined light work, and who never reported his opinion about Mrs. Campbell's ability to sit, stand, lift, or carry. Compare with, *Hall* v. *Harris*, 658 F.2d 260, 266 (4th Cir. 1981), and *Spencer* v. *Schweiker*, 678 F.2d 42, 44-45 (5th Cir. 1982), where the reporting physicians had stated that the claimants retained the capacity for a category of work, without defining it or referencing it to the regulations. While in *Hall* and

not testify about her ability to do any other jobs. She was not asked and did not testify about her specific levels of exertional ability, such as her ability to lift, carry, sit or stand.

In short, available highly relevant evidence of her residual exertional capacity and non-exertional limitations was not introduced because Mrs. Campbell had no meaningful notice of what she needed to prove.[17]

### D. Regulations Are Not An Adequate Substitute For Individualized Notice.

The Secretary argues that the notice prescribed by the Court of Appeals is unnecessary because all the elements in the disability determination process "are spelled out in the regulations" and because those regulations are "made available to claimants at district and branch offices." (Pet. Br. at 42). This position is untenable; regulations cannot substitute for meaningful notice directed specifically to individual claimants.

The grid regulations involve complex categories, numerous exceptions, and compound factual questions. The Secretary himself has acknowledged the difficulties involved in the assessment of disability when the issue of alternative employ-

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*Spencer*, the Courts held that such statements were not enough to support the findings of claimant's exertional capacity, the *Campbell* court focused on the fact that Mrs. Campbell was deprived of the opportunity to present contrary relevant evidence.

[17] The Secretary has an obligation not only to claimants, but also to reviewing courts, to assure that enough evidence is elicited and to make full and detailed findings in support of his conclusions, so that the courts are not "left guessing" about what the Secretary has in mind. *Small* v. *Califano*, *supra*, 565 F.2d at 801. See also, *Lewin* v. *Schweiker*, 654 F.2d 631, 634-635 (9th Cir. 1981); *Baerga* v. *Richardson*, 500 F.2d 309, 312 (3rd Cir. 1974), *cert. den.* 420 U.S. 931 (1975); *Choratch* v. *Finch*, 438 F.2d 342, 343 (3rd Cir. 1971); *Williams* v. *Celebrezze*, 359 F.2d 950, 952 (4th Cir. 1966).

ment is relevant. See, 43 Fed. Reg. 55349 (Nov. 28, 1978). The courts agree:

> Claimants, especially those not represented by counsel, can hardly be expected to be familiar with the intricacies of the Secretary's guidelines.

*McCoy* v. *Schweiker*, *supra*, 683 F.2d at 1144.

Furthermore, most federally funded benefits programs are governed by regulations, but the availability of regulations explaining relevant procedures has not dissuaded this Court from requiring specific, actual notice of these procedures where an interest protected by due process was at stake. See, e.g., *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 348; *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 267.

Notice by regulation has also been rejected as unreasonable in other contexts:

> . . . It is unrealistic to require each individual to be conversant with the procedural provisions of . . . ordinances, especially where the individual is faced with a potential condemnation of his property if he misreads or is not entirely familiar with that ordinance and is not informed of his right to appear to contest . . . Thus, we find that appellees' notice procedure of relying upon the public character of the ordinance was not 'reasonably calculated" to inform appellant of the availability of a hearing and that personal notice is required and will not impose an unreasonable burden upon the appellees. *Memphis Light, Gas and Water Div. [v. Craft*, 436 U.S. 1 (1978)]; *Graff* v. *Nicholl*, 370 F.Supp. 974, 983-84 (N.D. Ill. 1974).

*Wilson* v. *Health and Hospital Corp. of Marion County*, 620 F.2d 1201, 1215 (7th Cir. 1980).

The argument that regulatory definition of terms fulfills the statutory and due process notice requirement is without merit for other reasons as well. Nothing in the record of this case or in the Secretary's brief indicates that Mrs. Campbell was advised of the availability of the regulations or the importance of reading them. Furthermore, the regulations themselves do not include examples of the types of jobs contemplated for each

category of work. The actual lists of jobs can only be found in other more difficult sources relied on by the Secretary such as the *Dictionary of Occupational Titles* and the *Occupational Outlook Handbook*. See 43 Fed. Reg. 55351 (Nov. 28, 1978). The Secretary has not even suggested that these materials are available for claimants' inspection. Certainly the record does not disclose that anyone showed them to Mrs. Campbell.

What the record does show is that even if such materials had been available to Mrs. Campbell she might well have had trouble understanding them, given that she has only a sixth grade education and has some difficulties with English (J.A. 42). Mrs. Campbell's situation is not unusual. Approximately seventy per-cent of the claimants who appear at disability hearings do not have legal representation, 3 K. Davis, *Administrative Law Treatise* § 15.18, p. 199 (2d ed. 1980).[18]

To comply with due process requirements, notice must be reasonably calculated, under all the circumstances, to give real, meaningful, comprehensible information to those receiving it and must not require effort beyond their capacity. Notice of the factors to be determined in applying the grid is addressed to people trying to establish that they are disabled. It is not reasonable to require disabled people to make a separate trip to another office to try to find out what issues will confront them at their hearings. The Court of Appeals for the Seventh Circuit recognized the need to adjust the method of notice to the ability of its recipient in *Vargas* v. *Trainor*, 508 F.2d 485,

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[18] The grid regulations are also applicable to determinations of disability for the S.S.I. program, (see fn. 6, *supra*). Approximately 70 percent of the individuals in the S.S.I. population have not completed the eighth grade. Of this percentage, about 30 percent had not finished the fourth grade." 46 Fed. Reg. 42338 (Aug. 20, 1981). Further, "if 70 percent of the S.S.I. recipients dropped out of school at or below the eighth grade, it is fairly safe to estimate their maximum functional literacy skills at between a sixth and seventh grade level" *Id.*

489-490 (7th Cir. 1974), *cert. den.* 420 U.S. 1008 (1975), when it stated that it should be

> anticipated [that disabled claimants] would be unable, or disinclined, because of physical handicaps, and . . . mental handicaps as well, to take the necessary affirmative action . . . Under such a procedure, only the aggressive receive their due process right to be advised of the reasons . . . the weak and submissive remain in the back and suffer their benefits to be reduced or terminated without knowing why the Department is taking that action.

See also *Covey* v. *Town of Somers*, 351 U.S. 141, 147 (1956), holding that a party's ability to understand the meaning of a notice is a material factor which must be considered in evaluating its adequacy.

### E. The Second Circuit Decision Neither Invalidates The Grid Nor Imposes A Significant Burden.

The Secretary argues that the Second Circuit decision invalidates the grid because it requires him to give examples of jobs suitable to individual claimants which would necessitate testimony of vocational experts.[19] (Pet. Br. at 10). This is wrong. The decision does not require the Secretary to choose jobs particularly suited to the individual claimant. The Secretary need only mention a few jobs from the hundreds included

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[19] It is highly unlikely that the Court of Appeals would have invalidated the grid regulations by implication with no explanation given the rule that statutes are to be construed in such a way as to uphold their constitutionality and regulations are to be interpreted to avoid conflict with the statutes under which they are promulgated. See, e.g., *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174 (2d Cir. 1977); *U.S.* v. *Silberman*, 464 F.Supp. 866 (D.C. Fla. 1979). See also, *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *U.S.* v. *Vuitch*, 402 U.S. 62 (1971); *Flemming* v. *Nestor*, 363 U.S. 603 (1960). Given this principle of judicial construction, any ambiguity in the Court of Appeals decision should be read to uphold the regulation.

in the appropriate job category. The purpose is not to match the claimant to a perfect job but only to explain to the claimant in a concrete way what the whole job category is like.

Testimony of vocational experts is not needed. The ALJ himself can list several job examples from the relevant category. "[I]t would not be too great a burden for the Secretary or the ALJ to specify a few suitable alternative types of jobs . . ." *Campbell, supra*, 665 F.2d at 53. Indeed, the Second Circuit has never required the Secretary to provide vocational testimony in every case in which alternative employment was at issue.[20] Even in cases predating the grid regulations the Second Circuit allowed the Secretary to take administrative notice of the existence of jobs, as long as claimants were informed of the nature and demands of these jobs, so that they had a chance to establish that they could not do them. See, e.g., *Parker* v. *Harris, supra*, 626 F.2d at 233-234.

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[20] The Second Circuit decision in *Noel* v. *Schweiker*, No. 81-6156 (2d Cir. Feb. 22, 1982) (unpublished) is not to the contrary. There the Court of Appeals remanded three cases because "claimants were not given a chance to rebut any findings by the Secretary of suitable available alternative jobs." The Court made no mention of a need for testimony of vocational experts; it merely reiterated its position in *Campbell* that claimants must have a meaningful opportunity to put in evidence about their ability to do jobs in a given category. The work "testimony" relied on by the Secretary in his Reply Brief, p. 4, does not necessarily mean testimony of a vocational expert. In the informal, non-adversarial context of a disability hearing, even an A.L.J. can introduce evidence. See, Davis, *supra* § 15.18, p. 200-201. The recitation by the A.L.J. of examples of jobs fulfills the requirements of *Campbell* and of *Noel*. Moreover, it should be noted that the Secretary's reliance on *Noel* was inappropriate. The decision in *Noel* is unpublished and bears the prominent notice, "Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court."

While the Secretary need not present vocational experts at disability hearings to determine alternative employment, he must provide to the claimant some of the information that used to be available from listening to the testimony of a vocational expert, such as the specific capacities the claimant is assumed to possess and what jobs match those capacities. (See, Pet. Br. at 36). Application of the grid would deprive claimants of this information unless the Secretary provides it. The listing of a few jobs tells a claimant what factors will be used to make the decision on her claim without imposing any significant administrative burden. The examples thus make it possible for claimants to testify about the real issue of the hearing, their ability to perform alternative work.

## CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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# APPENDIX A

## MEMORANDUM TO THE FILE

CLAIMANT: Carmen Campbell
A/N : 093-40-3689

Claimant a 54 year old separate woman born on January 15, 1928 in Panama filed for disability insurance benefits on February 9, 1981 with an allejed on set date of December 15, 1978. The application was denied initially and on reconsideration. Claimant timely requested a hearing.

Claimant at the hearing stipulated to change her claimed onset date from December 10, 1978 to January 1, 1981 on the application.

Claimant met the special earnings requirements of the statute on the claimed onset date of January 1, 1981 and continues to meet then through December 31, 1983.

Claimant has six years of elementary education secured in Panama and four years of trade school also obtained in Panama. The trade school education pertained to sewing machine operations. Claimant is literate in Spanish and is functionally able to communicate in English. Claimant worked as a chambermaid in hotel establishments for about eight years until December 10, 1978 when a back injury caused her to leave her job. Claimant has not worked since December 10, 1978. Claimant has been collecting Workman's Compensation benefits of $48.00 a week since December 10, 1978. Claimant underwent a lumbar laminectomy in January 1979 for the removal of a herniated disc. She was hospitalized for eight days in 1980 for a woman's problem and again in October 1981 for the same disorder.

Claimant sees a Doctor Khatib regularly since 1978 and now sees a Doctor Briggs for back pains, hypertension, women disorders, and nerves. Claimant's chief complaints are of constant severe pains running down into her legs, inability to stand or sit for any appreciable period of time, deep depression, anxieties and nerves.

Medical records from Ashok Khanna M.D. reveals treatment in 1981 for severe pains, hypertension and anxieties. (Exhibit 13)

A consultation examination made by Samir K. Dutta M.D. on March 4, 1981 revealed stiffness of the neck muscles, both hip flexions were limited to 60 degrees with straight leg test positive to 50 degrees. There was stiffness of the left shoulder, tenderness over L4-L5, paraspinal muscle spasm, flexion was 50 degrees, scar was noted over the lower lumbar area for previous laminectomy. Par eshension over the left leg distribution L3, L4 was noted.

Impression was post disc removal, radiculopathy of the left side, with possible degeneration joint disease, and osteoarthritis of the *lumbosacral* spine. (Exhibit 16)

A radiographic examination made by Emanuell Mendelson M.D. on June 8, 1981 revealed findings of scoliosis, minimal hypertrophic spondiylitis, *mgelogram* and lumbosacral laminextomy. (Exhibit 18)

An electrocardiogram on August 3, 1981 revealed an interpretation of an old anteroseptal myocardial infarction. (Exhibit 18)

A consultative psychiatric examination made by Seyed Hashem, M.D. on May 29, 1981 revealed mood that was dysphonic. Claimant was fearful during the interview. Thought contents revealed depressive qualities, ideas of helplessness and hopelessness, feeling insecure with low self-esteem. Diagnosis was depressive neurosis. (Exhibit 18)

A consultative medical examination dated July, 20, 1981 revealed cardiac illness domented by an electrocardiogram of an old anterioseptal infarctions residuals from lumbosacral laminectomy with continued disc disease, scolosis and hypertension. (Exhibit 19)

A medical report from her treating physician Milton Lowenthal reveals treatment for severe low back pains. (Exhibit 20)

A medical letter from Reza Khatib M.D. on November 10, 1980 revealed claimant underwent a lumbar laminectomy in January 1979 for removal of herniated disc. (Exhibit 21)

A medical report made by Haydn Briggs M.D. a treating physician on February 11, 1982 diagnosis of hypertensions, cardiomegaly, arthritis, and adenomatosis hyperplasis of uterus. (Exhibit 22)

A medical report made by R. Kmath M.D. a treating physician on March 15, 1982 revealed treatment for residuals of a herniated disc. (Exhibit 23)

The Administrative Law Judge observed the claimant during the hearing and noticed an obese, sad individual, who had marked difficulties in sitting, standing and walking.

Based upon the medical evidence a severe back disorder, complicated by an emotional overlay, with several bodily disorders, and her sicky appearance, the Administrative Law Judge finds claimant disabled within the meaning of the law. Claimant stipulated that the onset date is January 1, 1981 for the current applications.

/s/ I. Bradford Spielman
I. BRADFORD SPIELMAN
Administrative Law Judge

Date: April 28, 1982
IBS: CA

# Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
FEB 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-1983

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

*v.*

CARMEN CAMPBELL

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONER

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Respondent contends that the court of appeals did not invalidate the medical-vocational guidelines. Rather, she argues, the court simply required that the Secretary name a few jobs at the administrative hearing as a way of satisfying the requirement of meaningful notice imposed by the Due Process Clause, the Social Security Act, the Secretary's own regulations, and the case law. Because this was not done in her case, respondent claims that her own hearing was defective. Each of these contentions is without merit.

1. Respondent claims (Resp. Br. 1-2, 15-16, 23-25) that the court of appeals did not hold the guidelines invalid. But, although the court did not strike down the guidelines in haec verba, its holding unquestionably renders them invalid. The fault the court found with respondent's hearing was that the Secretary had failed to litigate the very issue the guidelines were designed to remove from disability adjudication:

> "[T]he Secretary must present *evidence* showing the existence of specific types of jobs, available in the national economy, suitable for a claimant with these capabilities and skills."
>
> * * * * *
>
> The central issue in this case is whether the guidelines provide adequate *evidence* of a claimant's ability to perform a specific alternative occupation.
>
> * * * * *
>
> In failing to show suitable available alternative jobs for Ms. Campbell, the Secretary's finding of "not disabled" is not supported by substantial evidence.

Pet. App. 6a (quoting *Decker* v. *Harris*, 647 F.2d 291, 294 (2d Cir. 1981) (emphasis added)), 9a (emphasis added), 11a. The regulations, by contrast, state that "if the findings of fact made about all [medical and vocational] factors are the same as the rule, we use that rule to decide whether a person is disabled." 20 C.F.R. 404.1569; *id.*, Part 404, Subpart P, Appendix 2, Section 200.00(a).

In essence, the court of appeals simply set aside the guidelines because they depart from the procedural accretions of prior case law (Pet. App. 9a):

> Before and after the adoption of the guidelines this circuit has consistently required that

> "the Secretary identify specific alternative occupations available in the national economy that would be suitable for the claimant" and that "these jobs be supported by 'a job description clarifying the nature of the job, [and] demonstrating that the job does not require' exertion or skills not possessed by the claimant." * * * In the past, this has been done largely through the use of vocational testimony to establish that there are specific jobs suitable to the claimant's capabilities.

In *Decker* v. *Harris*, *supra*, 647 F.2d at 298, the court found it unnecessary to decide the validity of the guidelines, because it was not "squarely faced with the question of the compatibility between the rules' asserted notice of existing alternative jobs and the case law * * *." Here, however, the court found that "the issue [was] 'squarely presented'" (Pet. App. 10a) and chose its accustomed procedure over the Secretary's regulations ratified and long-sought by Congress. After the court's decision in this case, the Secretary petitioned for rehearing, pointing out that the decision had the inevitable effect of holding the regulations invalid. The petition was denied without comment.[1]

As we made clear in our opening brief (Pet. Br. 41-47), the guidelines are specifically designed to avoid the need for testimony by vocational experts about what occupations are " 'available in the national

---

[1] See also *Noel* v. *Schweiker*, Nos. 81-6156 *et al.* (2d Cir. Feb. 22, 1982) (unpublished), slip op. 1-2 ("This circuit recently examined the conflict between [the medical-vocational] guidelines and prior case law and resolved that conflict adversely to the Secretary in *Campbell* v. *Secretary of HHS*").

economy' " and " 'suitable for the claimant' " (Pet. App. 9a, quoting *Decker* v. *Harris*, *supra*, 647 F.2d at 298). The court of appeals acknowledged that its demands had "[i]n the past" been met "largely through the use of vocational testimony" (*ibid.*), but held out the possibility that the Secretary might " 'provide a similar degree of specificity' " in some other way (*id.* at 10a, quoting *Decker* v. *Harris*, *supra*, 647 F.2d at 298). That possibility, though, amounts to nothing more than a suggestion that ALJs could be retrained to perform the same function formerly undertaken by vocational experts. ALJs, like most claimants, are unaware of the requirements for "operat[ing] a pinking machine in a garment factory," and do not know whether "cut[ting] clippings from newspapers for a business service" assumes an ability to read (Resp. Br. 15-16). It is unrealistic to suppose that an ALJ could be prepared in advance to resolve all possible questions a claimant might raise about the availability and suitability of specific jobs. Other circuits have understood that "[i]f we were to require an ALJ to name particular jobs in such cases, we would force him to rely upon a vocational expert's testimony * * *." *Torres* v. *Secretary of HHS*, 677 F.2d 167, 169 (1st Cir. 1982). See also *Rivers* v. *Schweiker*, 684 F.2d 1144, 1155 n.12 (5th Cir. 1982); *Santise* v. *Schweiker*, 676 F.2d 925, 936-939 (3d Cir. 1982), petition for cert. pending, No. 82-5276 (filed Aug. 18, 1982); *Broz* v. *Schweiker*, 677 F.2d 1351, 1361 n.12 (11th Cir. 1982), petition for cert. pending, No. 82-816 (filed Nov. 15, 1982); Reply Br. 4. Thus, the court's decision effectively invalidates the guidelines by reinstating the system they were designed to replace.

2. Respondent correctly contends (Resp. Br. 10-13) that claimants are entitled by the Due Process

Clause, the Social Security Act, the Secretary's regulations, and the case law to meaningful notice of the issues to be decided at a disability hearing. Those requirements have nothing to do with this case, however, since what the court of appeals demanded was not notice of the issues to be decided, but litigation of an additional issue. Respondent's attempt (*id.* at 14-20) to read the court's decision as a mere "notice" requirement is inconsistent with the court's opinion, unsupported by the applicable law, and ineffective as a means of improving the hearing process.

a. The Due Process Clause unquestionably requires, as respondent maintains (Resp. Br. 12-13), "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Social Security Act itself implements this demand by requiring that disability claimants be given "reasonable notice and opportunity for a hearing * * *." 42 U.S.C. (Supp. IV) 405(b). The Secretary's regulations are still more specific. 20 C.F.R. 404.938 (notice of a hearing), 404.950 (right to appear and present evidence). Moreover, as respondent notes (Resp. Br. 11), the regulations do not stop at requiring prehearing notice. They impose on the ALJ a duty to "look[] fully into the issues [and] question [the claimant] and the other witnesses" (20 C.F.R. 404.944). The courts have interpreted that regulation as imposing "a ' "special duty . . . to scrupulously and conscientiously explore for all the relevant facts" ' where an unrepresented claimant has not waived counsel." *Broz* v. *Schweiker*, *supra*, 677 F.2d at 1364.

b. The court of appeals in this case, however, gave no hint that the Secretary, in applying the guidelines, had run afoul of any constitutional, statutory, or regulatory requirements. It did not mention the Due Process Clause, 42 U.S.C. (Supp. IV) 405(b), 20 C.F.R. 404.938, 404.950, or 404.944, or any case interpreting any of these provisions. Rather, what the court said was that by relying on the guidelines the Secretary had violated "prior case law" (Pet. App. 9a) because he had failed to litigate an additional issue at respondent's disability hearing—the availability and suitability of the alternative occupations underlying the tables in the medical-vocational guidelines. Naturally, litigation of that issue would also give "the claimant * * * a chance to put evidence into the record on that issue" (*id.* at 10a), and in that obvious sense one can speak—as the court below did—of giving the claimant "notice" (*ibid.*). But, according to the court of appeals, " '[t]he key consideration in the administrative proceeding must be that the claimant be given adequate opportunity to challenge' " matters that the Secretary has conclusively determined by regulation—" 'the suitability or availability of the jobs noticed.' " *Ibid.*, quoting *Decker* v. *Harris*, *supra*, 647 F.2d at 298. As we demonstrated at length in our opening brief (Pet. Br. 37-41, 43-47), such a requirement is not only unnecessary, but also subversive of the Secretary's statutorily authorized and congressionally approved regulations.

c. No doubt aware of the indefensibility of the requirement actually imposed by the court of appeals, respondent has attempted to clothe it in more modest dress. According to respondent, the court's demands would be satisfied if the ALJ simply mentioned to the

claimant that he thought she could "operate a pinking machine in a garment factory" or "cut clippings from newspapers for a business service" (Resp. Br. 15-16).[2] The mere mention of such occupations "would raise in the claimant's mind a picture of real jobs, in real factories or warehouses, with real working conditions, requiring continued presence, interaction with co-workers, and particular kinds of effort" (*id.* at 16). It would also "provide claimants with a concrete idea of * * * their levels of tolerance for specific exertional activity" (*id.* at 19). Thus, what the court really intended, respondent maintains, was to illustrate the concepts of exertional, vocational, and nonexertional requirements in a way that "would elicit all possibly relevant testimony from the claimant" (*id.* at 15).

It is clear that the formula respondent would have an ALJ follow is not required by the Due Process

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[2] In *Decker* v. *Harris*, *supra*, the state Bureau of Disability Determination and the ALJ explicitly stated that the claimant would be able to work as a soldering machine operator, a tester of electronic components, or a table worker. 647 F.2d at 293. The court held that such a listing did not satisfy its demands for specific job identification. *Id.* at 298-299. The "traditionally preferred" method was to call a vocational expert, the court said, but if the Secretary chose to "proceed without expert testimony" she was required to "provide a similar degree of specificity * * *." *Id.* at 298.

The court noted in passing that the guidelines did not have to conform to prior case law in cases where they directed a finding of "disabled." 647 F.2d at 298 n.4. That curious conclusion probably explains, better than respondent's tortured reading of the court's opinion, the *Campbell* court's failure to state explicitly that it was holding the medical-vocational guidelines invalid.

Clause,[3] the Social Security Act,[4] or the Secretary's own regulations.[5] For that reason alone, it would be improper for the court of appeals to alter the administrative procedure chosen by the Secretary in the manner suggested by respondent. "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. * * * [T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524 (1978). See *Steadman* v. *SEC*, 450 U.S. 91, 104 (1981). The Social Security Act gives the Secretary plenary authority to adopt not only substantive regulations, but also rules to govern the conduct of adjudicatory hearings (42 U.S.C 405(a)):

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[3] This Court's cases relied on by respondent (Resp. Br. 10-13, 20-23) address the right to prehearing notice, *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978); *Covey* v. *Town of Somers*, 351 U.S. 141 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and the right to a hearing, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), both of which were provided to respondent.

[4] 42 U.S.C. (Supp. IV) 405(b) says that the Secretary shall give each claimant "reasonable notice and opportunity for a hearing * * * and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact * * *." The notice contemplated is obviously prehearing notice, and the only specific requirement is that it be "reasonable."

[5] See page 5, *supra*, and page 9, *infra*.

> The Secretary shall have full power and authority to make rules and regulations and to establish procedures * * * which are necessary or appropriate to carry out [the] provisions [of this Title], and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

In the exercise of that authority the Secretary has required prehearing notice containing "a statement of the specific issues to be decided" (20 C.F.R. 404.938). He has also specified in considerable detail the proper hearing procedures (20 C.F.R. 404.944 to 404.961) and has included a requirement that the ALJ notify claimants of any new issues not brought out in the initial or reconsidered decision (20 C.F.R. 404.946).

For good reason, the Secretary has chosen not to require the naming of specific jobs as a way of illustrating the issues at disability hearings. Reciting the formula proposed by respondent could well mislead claimants about the nature of the disability inquiry. The question at each hearing is not whether a claimant can perform a specific job, such as operating a pinking machine, but whether he can perform "any substantial gainful activity" (42 U.S.C. 423(d)(1)(A)). Even if the claimant were able to raise some question about his ability to operate a pinking machine, that would not necessarily resolve the more general question whether he could perform a substantial number of the other jobs that the Secretary has determined, in the guidelines, are available and suitable for persons of the claimant's residual functional capacity. A disability claimant's efforts to prove his case are most usefully directed at marshalling evi-

dence on the correct classification of his residual functional capacity and vocational characteristics, rather than at discrediting the notion that he can perform a specific job mentioned at the hearing.

It is, moreover, implausible to suppose that the naming of specific jobs has the power of suggestion respondent attributes to it. One who has never operated a pinking machine is not likely to associate the job with mental, skin, or sensory impairments, pain (Resp. Br. 15), "interaction with co-workers" (*id.* at 16), lifting weights, walking any distance (*id.* at 19), or similar concepts. In addition, naming specific jobs is an ineffective means of giving notice of the issues at a disability hearing. Before an ALJ can make suggestions about work that would be appropriate for a disability claimant, he must first consider all the relevant evidence about the claimant's medical and vocational characteristics.[6] The "notice" for which respondent argues thus could not be given until the conclusion of the proceeding it is designed to inform claimants about. Respondent in fact concedes that her proposed interpretation of the court's opinion does not provide "flawless notice, and by itself [naming jobs] would certainly not advise claimants of all the issues to be considered" (*id.* at 16-17). But if her proposal is as defective as respondent confesses, it is difficult to believe that the court of appeals would have insisted on it as the required method for drawing out a claimant's side of the case. And if the court of appeals did in fact require it, it is impossible to

[6] As we pointed out in our opening brief (Pet. Br. 30), in cases decided before promulgation of the medical-vocational guidelines the vocational expert did not testify until the end of the hearing, after all relevant evidence about the claimant's individual characteristics had been introduced.

square with this Court's directions about the proper relations between courts and agencies in the design of administrative procedures.

3. In support of her claim that the identification of specific jobs is necessary to give claimants notice of the issues at disability hearings, respondent argues that her own hearing was inadequate. This claim is flatly rebutted by the record.

Respondent contends that "she was never notified that her ability to do alternative work was an issue" (Resp. Br. 17). Because her claim had been denied on the ground that she could do her past work, she suggests, she came to the hearing believing that the only issue would be whether she could work as a maid (*id.* at 2, 5, 17, 19-20). But the notice of hearing sent to respondent explicitly stated that she would not be considered disabled unless she had an impairment so severe that she was unable to do "not only * * * her usual work, but * * * any other kind of substantial gainful work which exists in significant numbers either in the region in which [she] live[d] or in several regions of the country" (R. 18; see also Pet. Br. App. 1a).[7] Moreover, the ALJ opened respondent's hearing by saying that he would inquire "whether your impairments are of such severity as to prevent the performance of your past * * * work, and whether you have the residual capacity to perform other types of work" (J.A. 37). Finally, when asked by the ALJ about her expectations for the future, respondent spoke about her contacts with a rehabilitation counselor and his offer to help her find work (J.A. 52-53)—thereby manifesting her understanding

[7] "R." refers to the administrative record.

that the issue was not simply whether she could do her past work.

Respondent also argues (Resp. Br. 18-20) that she did not have notice, and was not asked to testify, about her ability to meet the exertional (strength) requirements on which the tables in Appendix 2 (20 C.F.R. Part 404, Subpart P) are based. But the ALJ stated at the beginning of her hearing that he would "take * * * evidence on your residual functional capacity to engage in sedentary, light, medium, or heavy work. This essentially [is] * * * your ability to walk, stand, sit, lift, push, pull or carry" (J.A. 37).[8] And respondent herself submitted a residual functional capacity evaluation by one of her doctors (J.A. 31-33) that provided evidence on the precise factors relevant to her ability to meet the various exertional requirements. (The evaluation was done on a form developed by the Social Security Administration for the presentation of just such information.) She also submitted at the hearing letters from Dr. Lowenthal addressing the same issues (J.A. 21-22, 28-29). She was questioned and testified at the hearing about her ability to walk, stand, sit, lift weights, push, bend, stretch, climb stairs, and move her left arm (J.A. 46-51). The ALJ nevertheless concluded that the objective findings, the conclusions of her treating physician, and other statements by Dr. Lowenthal directed a finding that respondent could perform light work (Pet. App. 23a-25a). His

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[8] Moreover, Form HA-4607, sent to claimants along with the Notice of Hearing, states that "[t]he rules set out in Appendix 2 of Subpart P * * * will be considered in determining whether you are disabled" (Pet. Br. App. 1a).

decision was upheld by the Appeals Council (*id.* at 17a-18a), the district court (*id.* at 14a), and the court of appeals (*id.* at 7a).

Respondent also asserts (Resp. Br. 17), that she was not notified, and did not present proof, about non-strength limitations that would have made the tables in Appendix 2 inapplicable to her. "As a result," she contends, she "did not emphasize the limitations imposed by her pain. Nor did she testify about other non-exertional impairments * * * including an emotional problem, a postural problem evidenced by the use of a brace, the possible secondary effects of her medications, or her need to lie down during the day" (Resp. Br. 17; footnotes and citations omitted). But the ALJ stated at the beginning of her hearing that "I will take evidence and consider any mental, skin, sensory or environmental impairment that might limit your capacity to work" (J.A. 37). He also said that "[t]he rules contained in Appendix 2 of the Regulations will be applied in determining whether you are disabled. If you * * * have some non-exertional impairments, the rule will be used as a frame of reference" (J.A. 39).[9] Respondent was questioned and testified at length about her pain (J.A. 49-52),[10] her need to wear a corset (J.A. 49),[11] and the effects of

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[9] Moreover, Form HA-4607 states that "any nonexertional impairments will be taken into consideration" (Pet. Br. App. 1a).

[10] See, *e.g.*, J.A. 52 ("Are you in pain most of the time now?").

[11] "[T]hey gave me some corset to wear. And I [have] been working with a corset for approximately four years" (J.A. 49).

her medications (J.A. 51-52).[12] She introduced evidence about her need to lie down during the day (J.A. 32) and was asked by the ALJ whether she got "tired of standing as well as sitting" (J.A. 50).[13] At the conclusion of her hearing respondent was asked by the ALJ whether she had told him everything "about your medical problem, * * * as you understand it to be[.]" She responded, "I think so, sir. * * * I don't think I forg[o]t anything" (J.A. 54).[14]

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[12] "Q. [I]s your blood pressure kept under control with the medication?

A. If I take the pill * * * it comes down.

* * * * *

Q. How often do you take Valium?

A. He told me to take one and [a] half a day * * *. I try to skip it because I heard on the TV that Valium is * * * addicting.

* * * * *

Q. * * * What kind of pain pills [do you take]?

* * * * *

A. Right now * * * I take Anacin [and 150 milligrams of Elavil]." (J.A. 51-52).

[13] Respondent mentions an emotional problem suggested by the fact that she slept poorly and took Valium (Resp. Br. 17 & n.13). But at the hearing she indicated that both those facts were attributable to back pain. J.A. 51 ("I try to skip [the Valium] as much as I can, but then I get sleepless nights and I get a pain"). The ALJ also questioned respondent at some length about her relations with her husband and children (J.A. 40-41, 43-45, 46-47), though her answers gave no hint of mental illness. See J.A. 44 ("I would say that [my husband is] a good person but to each his own").

[14] Respondent suggests (Resp. Br. 6-7 & n.4, 17 n.13) that her later successful application for disability benefits was not based on a change in her condition. That suggestion is refuted by the record. The evidence submitted by respondent in connection with her second claim documents arthritis in respondent's knees, gynecological problems, and depressive neurosis, in addition to a worsening of her back problems. The second ALJ's decision was accordingly based on "a severe

For the foregoing reasons and the reasons stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

FEBRUARY 1983

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back disorder, complicated by an emotional overlay, with several bodily disorders, and her sickly appearance" (Resp. Br. 3a).

For example, Dr. Lowenthal's reports submitted in connection with respondent's first application showed that the range of motion and motor power in respondent's knees were normal (J.A. 21, 28). Reports submitted for her second application by Dr. Lazarus (Exh. 19, dated July 20, 1981) and Dr. Briggs (Exh. 22, dated Feb. 11, 1982) note that respondent had arthritis and a degenerative bone disease in her knees. Dr. Briggs also noted that between 1980 and 1982 respondent had had several operations for hyperplasia of the uterus, a condition not mentioned in connection with her original application. A psychiatric report submitted by Dr. Hashemi (Exh. 18, dated May 29, 1981) diagnosed respondent as suffering from depressive neurosis.

The change in respondent's back condition is most evident from the reports of Dr. Khatib, her treating physician. In 1979 Dr. Khatib stated that respondent could "return to light duty work" (J.A. 11). In 1980 Dr. Khatib offered only the limited warning that respondent "should avoid lifting heavy objects and strenuous work" (*id.* at 55). In his March 15, 1982 report submitted in connection with respondent's second application (Exh. 23) Dr. Khatib stated that respondent could lift no weight at all, and that she was awaiting hospitalization for a repeat myelogram.

"Exh." refers to exhibits in respondent's file for her second disability application. A copy of the file has been lodged with the Court and furnished to respondent's counsel.

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# Amicus Brief

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

CARMEN CAMPBELL,

Respondent.

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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# BRIEF AMICUS CURIAE OF THE GRAY PANTHERS

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# BRIEF AMICUS CURIAE OF THE GRAY PANTHERS

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## INTEREST OF AMICUS GRAY PANTHERS

Pursuant to Supreme Court Rule 36, counsel for the petitioner and the respondent have consented to the filing of this amicus brief. Their letters of consent have been filed with the Clerk of the Court.

The Gray Panthers is a national organization comprised of approximately 40,000 individuals who reside throughout the United States. "Dedicated to helping the Nation's elderly," Schweiker v. Gray Panthers, 453 U.S. 34, 40 (1981), its members seek to reform and improve various laws and institutions which affect the lives of the nation's elderly, many of whom are disabled.

Amicus appears before this Court with two concerns. First, amicus is concerned that the position taken by the petitioner will seriously disadvantage the rights of unrepresented disabled individuals appearing before administrative law judges on appeals from denials or terminations of disability benefits under the Old Age, Survivors, and Disability Insurance (OASDI) program and the Supplemental Security Income

(SSI) program. Second, amicus is concerned that the Secretary is not adhering to the various exceptions upon which he relies in justifying the medical-vocational regulations. Amicus therefore wishes to emphasize the importance of these exceptions and protections to disabled claimants and beneficiaries of the OASDI and SSI programs.

## SUMMARY OF ARGUMENT

The Second Circuit Court of Appeals' decision focuses on one aspect of application of the medical-vocational regulations. Contrary to the petitioner's assertions, the court did not invalidate these regulations. Instead it focused on the protections which must be afforded to a disabled individual, appearing pro se before an administrative law judge. Such an individual is faced with a morass of exceedingly complex

hoops through which he/she must jump before being found eligible to receive benefits.

It is the purpose of this brief to make the following two points:

1. The Second Circuit's decision is consistent with due process, the Secretary's regulation, and the case law regarding the obligations of an administrative law judge and the Secretary when the claimant appears pro se.

2. If the medical-vocational regulations are valid, it is because application of the regulations (a) creates only a rebuttable presumption and (b) is limited to situations where only exertional limitations are at issue.

## ARGUMENT

I. The Court of Appeals' decision is consistent with due process, the Secretary's regulations, and the case law regarding the obligations of an administrative law judge and the Secretary when the claimant appears pro se.

The procedures utilized in Social Security hearings must be "fundamentally fair." Richardson v. Perales, 402 U.S. 389, 400-401 (1971). It is Congress' intent that the "emphasis" at these hearings be "upon the informal rather than the formal." Id. "[T]hese hearings should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone." Id.

The Second Circuit in Campbell simply held that a pro se claimant is entitled to be told of the types of jobs included within a category which

the administrative law judge intends to apply to him/her. This is necessary in order to assure that "a claimant is given an opportunity to show that she is incapable of performing those jobs." 665 F.2d at 54.

This ruling is consistent with fundamental fairness and with the Secretary's own regulations which clearly state that all of the findings utilized in the grids are rebuttable [Section 200.00 (a), Appendix 2, Subpart P, 20 C.F.R. Part 404][1/] and that it is the administrative law judge's (ALJ's) duty to

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1/ "...Where the findings of fact made with respect to a particular individual's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled. However, each of these findings of fact is subject to rebuttal and the individual may present evidence to refute such findings. Where any one of the findings of fact does not coincide with the corresponding

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"look(s) fully into the issues", 20 C.F.R. §404.944.[2/]

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criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled. In any instance where a rule does not apply, full consideration must be given to all of the relevant facts of the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations. Section 200.00(a), Appendix 2, Subpart P, 20 C.F.R. Part 404. (emphasis added). The medical-vocational guidelines are most commonly referred to as "the grids", due to the format adopted by the Secretary in setting forth the rules. This term is used by amicus in this brief.

2/ 20 C.F.R. §404.944 provides: "...At the hearing, the administrative law judge looks fully into the issues, questions you and the other witnesses, and accepts as evidence any documents that are material to the issues."

Notice is essential to providing unrepresented claimants with "a meaningful opportunity to present their case." Mathews v. Eldridge, 424 U.S. 319, 349 (1976). In order to effectively rebut the presumption, the claimant must be told what rules the ALJ intends to apply as well as what they mean. Here the Second Circuit held that Mrs. Campbell must be told of some examples of the types of jobs which the ALJ believed she could do, so that she would be able to understand the type of activity involved and, thus, have the opportunity to indicate why she did not believe that she could perform work covered in the medical-vocational category chosen by the ALJ.

The circuit courts of appeals have generally held that both the purposes

of the Social Security Act and the Secretary's own regulation, 20 C.F.R. §404.944, dictate that ALJs will be held to a higher standard of conduct where the claimant is not represented. The ALJ must "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38, 43 (2d Cir. 1972). This obligation includes obtaining needed medical evidence, [3/] adequately

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3/ See, for example, Currier v. Secretary of Health, Education and Welfare, 612 F.2d 594 , 598 (1st Cir. 1980) ["...we believe this responsibility increases in cases where the appellant is unrepresented, where the claim itself seems on its face to be substantial, where there are gaps in the evidence necessary to a reasoned evaluation of the claim, and where it is within the power of the administrative law judge, without undue effort, to see that the gaps are somewhat filled - as by ordering easily

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questioning the claimant regarding the nature and duration of his/her impairments,[4/]

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obtained further or more complete reports or requesting further assistance from a social worker or psychiatrist or key witness."]; Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38, 43-44 (2d Cir. 1972) ["[T]he examiner did not grant Mrs. Gold a full hearing under the Secretary's regulations and in accordance with the beneficent purposes of the Act.... His intolerance of her confusion and inability to digest the written exhibits with which she was faced shortly before the hearing began, his failure to call witnesses or to indicate that she ought to do so because he considered her case unpersuasive ...compounded Mrs. Gold's difficulties and provided her with less than a fair hearing."] See also, Cullison v. Califano, 613 F.2d 55, 58 (4th Cir. 1980); Diabo v. Secretary of Health, Education and Welfare, 627 F.2d 278, 282 (D.C. Cir. 1980); Landess v. Weinberger, 490 F.2d 1187, 1188-89 (8th Cir. 1974).

4/ See, for example, Copley v. Richardson, 475 F.2d 772, 773-4 (6th Cir. 1973); Veal v. Califano, 610 F.2d 495, 497 n.6 (8th Cir. 1979); Cox v. Califano, 587 F.2d 988, 990-91 (9th Cir. 1978).

even recognizing and investigating impairments not identified by the claimant;[5/] and properly and completely questioning expert witnesses, such as vocational experts.[6/] The Second Circuit's decision

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5/ See, for example, Cullison v. Califano, 613 F.2d 55, 58 (4th Cir. 1980) [The ALJ failed to investigate a documented history of emotional impairments where the claimant disclaimed the existence of such problems.] See also, Smith v. Secretary of Health, Education and Welfare, 587 F.2d 857 (7th Cir. 1978).

6/ See Diabo v. Secretary of Health and Human Services, 627 F.2d 278, 283 (D.C. Cir. 1980); Johnson v. Harris, 612 F.2d 993, 998 (5th Cir. 1980); Brenem v. Califano, 621 F.2d 688, 689-90(5th Cir. 1980); Lewis v. Califano, 574 F.2d 452, 456 (8th Cir. 1978).

in Campbell is consistent with these decisions: in the context of the grids, it is the ALJ's obligation, both under the statute and the Secretary's regulations, to assure that the unrepresented claimant's case is fully and fairly presented. Because the grids are complicated and not easily understandable to the lay person, it is both reasonable and necessary that the ALJ illustrate the rules with examples of their meaning.[7/] In this

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7/ While Mrs. Campbell was denied benefits under the disability insurance component of the Social Security program, it should be noted that these regulations are equally applicable to applicants and recipients for disability benefits under the Supplemental Security Income (SSI) program, 42 U.S.C. §1381 et seq. SSI is a federally-funded needs-based program providing cash benefits to indigent elderly, blind, and disabled individuals. As the Secretary has recognized, the average educational level and functional literacy level of SSI recipients is relatively low. In response to litigation, the Social Security Administration proposed changes in its notice of overpayment

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case, in order to assure that Mrs. Campbell's hearing was fundamentally fair, that

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sent to SSI recipients. 46 Fed. Reg. 42337 (August 20, 1981). The purpose was to "increase SSI applicants' and recipients' awareness of administrative procedures so that they can make informed, knowledgeable and voluntary decisions in the critical area of SSI appeals." Id. at 42338. The changes were based on conclusions that "approximately 70 percent of the individuals in the SSI population have not completed the eighth grade. Of this percentage, about 30 percent had not finished the fourth grade." Id. Further, "if 70 percent of the SSI recipients dropped out of school at or below the eighth grade, it is fairly safe to estimate their maximum functional literacy skills at between a sixth and seventh grade level." Id. However, SSA noted that the "literacy lag" for welfare recipients may be even worse, often four years less than the level of schooling last obtained. Id. Given these figures, it is difficult to understand the petitioner's position that disabled individuals, including SSI recipients and many functionally illiterate Social Security claimants, are able to digest petitioner's regulations regarding establishing eligibility for disability benefits, therefore rendering the notice of jobs required by the Second Circuit unnecessary. (Pet. Br. pp. 12,42).

she understood what it was that she was required to rebut, the court correctly concluded that examples of cases should have been provided.

The decisions cited above both precede and follow the Secretary's issuance of the medical-vocational guidelines, 43 Fed. Reg. 55349 (November 28, 1978), which took effect on February 26, 1979. Nothing in these guidelines in any way mitigates the administrative law judge's obligation to assure that a full and fair hearing is provided. Santise v. Schweiker, 676 F.2d 925, 937-8 (3d Cir. 1982)[8/] They do, however, set up a somewhat

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8/ Further, in the preamble to the final regulations, the Secretary stated, "[W]e do not agree that a person could not prosecute his or her own disability claim or would be likely, because of these regulations, to need attorney representation more than in the past." 43 Fed. Reg. at 55356.

different frame of reference for both the administrative law judge and the claimant.

Once it has been established that the claimant can no longer perform her former job, the burden shifts to the Secretary to establish that the claimant retains the residual functional capacity to perform other jobs. To apply the regulations, a number of "facts" must first be ascertained. These include the person's age, educational level, previous work experience, and residual functional capacity to lift, sit, stand, carry, push, and perform other exertional activities. In addition, it must be determined whether there are other "facts" which preclude application of the grids. These facts include the existence of mental, sensory, or skin impairments

("non-exertional" impairments); postural or manipulative limitations; environmental restrictions which create an intolerance to certain work settings, such as the inability to tolerate dust, fumes, heat, or cold, Rule 200.00(e), or the inability to perform work on a "sustained" basis. Rule 200.00(c). Consistent with 20 C.F.R. §404.944 and the case law, it is the obligation of the ALJ to assure that the unrepresented claimant is able to understand what is required and present all evidence related to all of these facts.

The Second Circuit's decision simply put teeth in the concept of notice which is implicit in the ability of an unrepresented claimant[9/] to exercise

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9/ While it would be desirable if the ALJ provided this notice in all cases, it is much more likely that a represented

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his right to rebut the "facts" in a meaningful fashion. It did not invalidate the grids, but instead interpreted them in the only light which renders them constitutionally sufficient.[10/]

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claimant's representative will have anticipated possible problems with the grids and prepared his/her presentation accordingly.

10/ The opportunity to rebut the "facts" is critical to the validity of the grids. If these "facts" are irrebutable, serious questions arise regarding the constitutionality of the guidelines. See Stanley v. Illinois, 405 U.S. 465 (1972); Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); Turner v. Department of Employment Security, 423 U.S. 44 (1975). In addition, if the claimant is not even to be provided notice at the hearing of the presumptions which the ALJ will utilize and what they mean, it is likely that the content of the written notice informing the claimant that the hearing has been scheduled is constitutionally flawed. Numerous decisions have held various written notices to be constitutionally defective because they failed to spell out in sufficient detail the information required

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The requirements imposed on the Secretary as a result of the Campbell decision are minimal. Contrary to his assertions, he will not be required to request that vocational experts appear at each hearing. Instead, he will be required to provide the claimant with a few examples of jobs from the category

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in order to intelligently respond. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950) [The notice "must be of such nature as reasonably to convey the required information..."]; Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 14 (1978) ["The purpose of the notice under the Due Process clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'"].

which the ALJ expects to apply to the claimant. This will assist the unrepresented claimant in focusing his/her attention on the exertional requirements of such a job and better enable him/her to address why such a finding would be improper.

## II. If the medical-vocational regulations are valid, it is because application of the regulations (a) creates only a rebuttable presumption and (b) is limited to situations where only exertional limitations are at issue.

Should the Court determine that the issue of the validity of the regulations is properly before the Court at this time, amici stress that if the regulations are valid, their validity stems from the many exceptions to their applicability and the various protections provided claimants, all set forth in the Secretary's

regulations.[11] These exceptions become even more critical when considered in light of recent court decisions indicating the Secretary's failure to respect the

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11/ The medical-vocational regulations are not applicable, or at best applicable only in an advisory capacity, where the claimant has nonexertional impairments, including mental, sensory, or skin impairments, postural and manipulative limitations or environmental restrictions. Rule 200.00(e), Appendix 2, Subpart P, 20 C.F.R. Part 404. Similarly, if a person can not perform substantial gainful activity on a "sustained" basis, Rule 200.00(c), the regulations do not apply. If any of the findings of fact regarding age, education and residual functional capacity do "not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled." Rule 200.00 (a). Finally, where the ALJ determines that the regulations are applicable based on the required findings of fact, "each of these findings of fact is subject to rebuttal and the individual may present evidence to refute such findings." Id.

limitations of his own regulations. See cases cited, at footnote 12. 42 U.S.C. §405(a) provides the Secretary with power to issue regulations and to establish procedures "not inconsistent with the provisions of this subchapter" and to adopt "reasonable and proper" rules "to regulate the nature and extent of the proofs and evidence..." Only the various exceptions, limitations upon the application of the regulations, and protections create the possibility that the grids are "reasonable and proper."

The circuit courts of appeals which have upheld the validity of the medical-vocational regulations have recognized that the regulations are only applicable to exertional impairments and limitations and, further, that the claimant has

the opportunity to rebut. In Kirk v. Secretary of Health and Human Services, 667 F.2d 524, 528 (6th Cir. 1981), the court noted, "however, the claimant has the opportunity to present evidence and to rebut and challenge each and every component that makes up the grid before disability is decided." Further, "of equal significance are the built-in limitations of the grid," including (a) the grid only applies when all of facts in the individual's case coincide with those on the grid; (b) it "specifically disclaims an ability to predict disability when nonexertional impairments are the focus of a claimant's impairment;" and (c) "the grid only applies if the individual is capable of performing a wide range of jobs at the designated level, - i.e., sedentary, light, or

medium." 667 F.2d at 528-529. See also Santise v. Schweiker, 676 F.2d 925, 928 n.9 (3rd Cir. 1982) [where the claimant "falls between the various definitional categories" or has "certain non-exertional impairments (e.g., a psychotic headache; a sensory or skin disorder) in addition to exertional limitations..."]; Geoffroy v. Secretary of Health and Human Services, 663 F.2d 315, 318 (1st Cir. 1981) [opportunity to rebut and present refuting evidence]; Cummins v. Schweiker, 670 F.2d 81, 84 (7th Cir. 1982) [exclusion of sensory, nonexertional impairments].

The decisions reviewing the Secretary's application of the grids reflect a disturbing disregard by the Secretary of these

exceptions.[12/] A decision regarding the

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12/ See, for example, Gagnon v. Secretary of Health and Human Services, 666 F.2d 662, 665-666 (1st Cir. 1981) [error to apply the grids without consideration of the claimant's nonexertional limitations, which included the need "avoid moving machinery, marked temperature and humidity changes, and dust, fumes, and gases" and "fainting spells, pain, and significant postural/manipulative disabilities which were the nonexertional side effects of his missing leg"]; Roberts v. Schweiker, 667 F.2d 1143, 1145 (4th Cir. 1981) [error to apply the grids where a nonexertiona limitation, "the need to avoid breathing certain fumes or dust," exists]; Thomas v. Schweiker, 666 F.2d 999, 1004 (5th Cir. 1982) [error for the ALJ to apply grids, ignoring evidence that the claimant can perform sedentary work "only in an environment free of dust, excessive heat, and toxic fumes"]; Cannon v. Harris, 651 F.2d 513, 518-520 (7th Cir. 1981) [error to apply the grids where there was evidence of the claimant's alcoholism]; Proctor v. Schweiker, 526 F. Supp. 70 (D.Md. 1981) [error for the Secretary to apply the grids where the claimant could not perform sedentary work on a sustained basis, citing 20 C.F.R. §404.1505(b); Rule 200.00 and 201.00(h), Appendix 2, Subpart P, Regulation No. 4]; Fields v. Harris, 498 F. Supp. 478, 492 (N.D.Ga. 1980)

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validity of the grids by this Court which does not mention the many exceptions to its applicability is likely to result in more decisions by the Secretary like those reversed by the courts, a corresponding increase in the number of cases where claimants will seek judicial review

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[The "exceptions and qualifications" to the grid "are quite intricate." The ALJ's "blind reliance" on the grid was in error where the claimant had non-exertional limitations (dizziness, depression, limited manipulative ability, inability to perform the full range of sedentary jobs).] Ford v. Harris, Unempl. Ins. Rptr. [CCH] ¶16,782 (D.Tenn. 1980) [pain, numbness, and restrictive range of motion]; Slocum v. Califano, Unempl. Ins. Rptr. [CCH] ¶16,806 (D.Haw. 1979) [severe allergic reaction to common chemicals in the environment].

pursuant to 42 U.S.C. §405(g), and, of even greater concern, the denial of benefits to eligible disabled individuals who will be without the wherewithal to effectively pursue an appeal.

## CONCLUSION

For all of the reasons outlined above, amicus urges affirmance of the decision of the Second Circuit Court of Appeals or dismissal of the petitioner's appeal.

Respectfully submitted,

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November 12, 1982

# Amicus Brief

# 2

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NO. 81-1983

IN THE

SUPREME COURT OF THE UNITED STATES

October term 1982

RICHARD S. SCHWEIKER, Secretary of Health and Human Services,

Petitioner

v.

CARMEN CAMPBELL,

Respondent

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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# AMICI CURIAE BRIEF OF TULARE/KINGS COUNTIES LEGAL SERVICES AND FRESNO/MERCED COUNTIES LEGAL SERVICES

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NO. 81-1983

IN THE

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RICHARD S. SCHWEIKER, Secretary of Health and Human Services,

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CARMEN CAMPBELL

Respondent.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# Brief of Amici Curiae

Tulare/Kings Counties Legal Services, Inc., Fresno-Merced Counties Legal Services, in support of Respondent.

a. Interest of Amici Curiae.

Amicus Curiae Tulare/Kings Counties Legal Services, Inc.is a

non-profit corporation incorporated under the laws of California for the purposes of representing low income persons and is governed by a Board of Directors consisting of members of the private bar and lay persons from the geographical area. This Board of Directors has required that Tulare/Kings Counties Legal Services, Inc. give first priority to assisting and representing persons attempting to establish their eligibility for benefits such as Social Security and Supplemental Security Income. A large proportion of Tulare/Kings Counties Legal Services, Inc.'s caseload consists of disability claimants. Tulare/Kings Counties Legal Services, Inc. is concerned with the issues of this case as it will impact upon the people they represent. Furthermore, Tulare/Kings Counties Legal Services, Inc. has a case pending

decision in the Ninth Circuit Court of Appeals, James Odle vs. Patricia Harris, #81-4227, in which issues concerning the validity of using the grids, without more, to deny disability are raised.

Amicus Curiae Fresno-Merced Counties Legal Services is also a non-profit corporation, incorporated under the laws of the State of California to represent low income perons. Fresno-Merced County Legal Services takes an active part in the representation of claimants before the Social Security Administration and in Federal Court, and in assisting and training community advocacy groups, such as the California Association for the Physically Handicapped and members of the private bar do such representation.

All Amicus are intensely concerned with the issues of the case as it will impact upon the people they represent.

## SUMMARY OF ARGUMENT

On February 26, 1979, the Secretary of Health and Human Services adopted new "medical vocational guidelines", 43 Fed.Reg. 55349 et seq. These guidelines provide for sequential analysis of disability set forth in detail at 20 C.F.R. 404.1520 et seq.[1] Under this system of analysis, a claim for disability benefits is analyzed in a series of "steps". At the fifth "step" of this procedure, the Secretary has augmented the procedure by setting forth rules and guidelines for the evaluation of age, education and work experience in conjunction with a determination of whether or not a claimant can engage in

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[1] 20 C.F.R. 404.1520 et seq applies to the SSA Program. The same rules are set forth at 20 C.F.R. 416.960 et seq for the SSI Program, which applies the same standards for disability determination as does the SSA Program.

other work. These rules and guidelines are found at Appendix 2 of 20 C.F.r., Chapter III, Part 404, Sub Part P.[2] In conjunction with Appendix 2, the Secretary has adopted a series of rules (201.01-201.29; 202.01-202.22; 203.01-203.31) which, under certain circumstances, purport to mandate a conclusion of "disabled" or "not disabled". Because these rules are set forth in the form of a chart, they are commonly, and hereinafter, referred to as "the grids".

The Secretary has acted in excess of his statutory rule-making authority by promulgating regulations whereby he takes administrative notice of certain "facts" and thereby reaches a legal conclusion "disables" or "not

[2] 20 C.F.R. 416.969 refers SSI claimants to Appendix 2 of Part 404, Sub Part P.

disabled". These "facts", however, are never specified in the record at any time, and claimants, therefore, have no opportunity to examine, comment on or rebut such noticed "facts". This procedure violates not only 42 U.S.C. 405(b) but also violates well-accepted principles of constitutional law and administrative adjudicative practice as set forth in 5 U.S.C. 556 (e) and various decisions of this Court. The use of such notice, moreover, negates the long accepted principle that benefit decisions under the Social Security Act are to be made on an individualized basis and substitute an "average person" standard.

## ARGUMENT

### I. THE RULING OF THE SECOND CIRCUIT IS APPROPRIATE BECAUSE THE GRID REGULATIONS VIOLATE STATUTORY PROVISIONS AND CONSTITUTIONAL PRINCIPLES.

a. The Secretary's Authority to Make Rules and Regulations Is Not Unlimited.

The Secretary is granted rule-making authority by 42 U.S.C. 405(a):

> The secretary shall have full power and authority to make rules and regulations, and to establish procedures, not inconsistent with the provisions of this sub-title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of proofs and evidence, and the method of taking and furnishing the same in order to establish the right to benefits hereunder. . .

Rules made pursuant to a specific grant of power have

"legislative effect" and cannot be set aside simply because the court would have regulated differently. Batterton vs. Frances 432 U.S. 416, 425 (1977); Schweiker vs. Grey Panthers 453 U.S. 34, 44 (1981).. In such instances, the regulation can be set aside "only if the secretary exceeded his statutory authority, or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in conformity with the law'." Batterton vs. Frances, supra, 432 U.S. 425. [3]

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[3] In Batterton, the Secretary was given specific authority to define "unemployed" and in Grey Panthers, the Secretary was given specific authority to define "available income". A review of the act will show there are other instances where the Secretary is granted specific authority to make regulations with "legislative effect" e.g.: 42 U.S.C. 423(d)(2)(B) "a widow... shall not be determined to be under a disability...unless his or her physical or mental impairment is of such a level

(footnote cont'd on next page)

It is clear from Batterton, supra, that such a standard is not to be universally applied to all regulatory actions: "Ordinarily, administrative interpretations of statutory terms are given important, but not controlling significance." Batterton vs. Frances, supra, 432 U.S. 424. 42 U.S.C. 405(a) specifically limits the Secretary's rule-making power to the making of rules "not inconsistent with the provisions of the subchapter".

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(footnote cont'd from previous page)

of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude...any gainful activity." (Emphasis Added); 42 U.S.C. 423(d)(4) "The Secretary shall by regulations prescribed the criteria for determining when services performed or earnings derived from services demonstrate '...substantial gainful activity'."; 42 U.S.C. 416(i)(2)(F)(i) concerning time to file application "and the Secretary finds in accordance with regulations prescribed by him that the failure of such individual to file..."

In order to determine the Secretary's authority to promulgate any particular rule, it is necessary to examine the act as a whole and to further examine the section of the act which rule concerns. Philbrook vs. Glodgett, 421 U.S. 707, 714 (1975); Saxon vs. Georgia Association of Independent Insurance Agents, Inc. 399 F.2d 1010, 1013 (5th Cir. 1968). The Court has not, in the past, hesitated to set aside the Secretary's rules and regulations when such are deemed to violate the provisions of the Social Security Act.

> Administrative determinations must have a basis in law and must be within the granted authority. Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power. Congress might have declared that

'back pay' awards under the labor act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function. Congress used a well-understood word - 'wages' to indicate the receipts which were to govern taxes and benefits under the Social Security Act...We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative

routine". Social Security Board vs. Nierotko 327 U.S. 358, 369 (1946).

The instant case concerns the Secretary's implementation of the SSA and SSI Disability Programs as "disability" is defined in 42 U.S.C. 423(d)(1)(A), 42 U.S.C. 423(d)(2), 42 U.S.C. 423(d)(3) and 42 U.S.C. 1382c(a)(3)(A,B,C). A review of these sections reveals that Congress has defined "disability" in great detail and at some length. Nowhere in these sections is the Secretary given a broad grant of substantive, rule-making authority as was found in Batterton and Grey Panthers, supra. The Secretary's authority herein is, therefore, limited to establishing procedures and to making "proofs and evidence" rules, 42 U.S.C. 405(a).

It is Amici's contention that

the Secretary, in promulgating the grids, has gone beyond establishing procedures and making "proofs and evidence" rules and that the grids violate the Social Security Act, the Administrative Procedure Act and various constitituional principles.

b. The Grids Violate 42 U.S.C. 405(b) and 5 U.S.C. 556(e).

42 U.S.C. 405(b) and fundamental fairness require that decisions be based on evidence adduced at the hearing in such a way as to allow the claimant as meaningful opportunity to examine, rebut or refute it. 42 U.S.C. 405(b) states, in pertinent part,

> The Secretary is directed to make findings of fact and decisions...any such decisions by the Secretary which involves determination of

disability...unfavorable...upon request...he shall give...reasonable notice and opportunity for a hearing...and...shall on the basis of evidence adduced at the hearing, affirm, modify or reverse. (Emphasis Added)

The formal rules of evidence are not strictly applied in administrative proceedings in the manner in which they are applied in the courtroom, Richardson vs. Perales 402 U.S. 389, 409 (1971), 42 U.S.C. 405(b), and hearsay statements may be admitted and administrative notice may be taken where it is appropriate to do so Banks vs. Schweiker 654 F.2d 637, 640 (9th Cir. 1981). This Court has stated: "The more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential

rules of evidence by which rights are asserted or defended." I.C.C. vs. Louisville N.R. Co., 227 U.S. 88, 33 S.Ct. 185, 187 (1913).

While the Secretary may take notice of facts of common knowledge, Mullins vs. Finch 319 F.Supp. 588, 592 (W.D. Va. 1970), and capable of certain verification Alvary vs. U.S. 302 F.2d 790 (2nd Cir. 1962), notice may not be taken of facts that are not undisputedly true, and the "more critical a factual issue is to a case, the more reluctant courts should be to determine such issue by taking notice". TWA vs. Hughes 308 F.Supp. 679, 684 (S.D.N.Y. 1969), motion denied, 314 F.Supp. 94 (S.D.N.Y. 1970), modified, 449 F.2d 51 (2nd Cir. 1971) cert. granted, Hughes Tool Co. vs. TWA, 405 U.S. 915 (1972) reversed, 409 U.S. 363 (1973) reh. den., 410 U.S. 975 (1973) on remand, 359 F.Supp. 783

(S.D.N.Y. 1973).

When notice is taken of facts not undisputedly true, the opponent is not precluded from offering contrary evidence. TWA vs. Hughes, Supra 308 F.Supp. 679, 684. Citing Ohio Bell vs. P.U.C., 301 U.S. 292, 301-302, (1937) and U.S vs. Aluminum Company of America, 148 F.2d 416, 445-446 (2nd Cir. 1945). The Administrative Procedure Act goes on to state at 5 U.S.C. 556(e): "When an agency decision rests on official notice of a material fact not appearing in the record, a party is entitled, on timely request, to an opportunity to show the contrary". As will be shown, this opportunity is categorically denied when the grid regulations are applied to deny a Social Security claim.

The primary factual determination to be made in adjudicating a Social Security claim is whether or

not there are jobs in the economy the claimant can perform, 42 U.S.C. 423(d)(2)(A). The determination of the ultimate question of disability is dependent upon this particular finding of fact. Through the use of the grids, the Secretary seeks to establish these disputed factual questions through administrative notice, in direct contradiction to these established legal principles.

The Secretary in formulating the grid, has allegedly taken notice of a broad spectrum of sources. As an example, the Secretary has specifically cited to the Census Reports, County Business Patterns, the Occupational Outlook Handbook, the Occupational Analysis, and the Dictionary of Occupational Titles, 43 Fed.Reg. 55365 (1979), 20 C.F.R. 404.1566(d). Since the Secretary cites these sources as

"examples", it is not possible to tell from the regulations whether or not he is actually taking notice of the enumerated sources, or of other sources.

The regulations, moreover, do not specify what factual presumptions and conclusions from which sources are used to determine the operation of each rule, nor do they specify the weight to be given to the various factual presumptions. The system essentially operates as a "black box". Known facts about a claimant, such as his age, education, work experience, and functional capacity expressed in terms of ability to sit, stand, walk, lift and carry are fed into the system, and a legal conclusion of disabled or not disabled is thus dictated. Somewhere within the "black box" of the grids, the Secretary takes notice of jobs available

in the national economy. For any particular rule, however, it is impossible to determine whether the ultimate conclusion is based on accepted fact, statistical extrapolation, or wishful thinking.

It is also impossible to determine with any kind of accuracy or intelligent reasoning, what and how factors other than the ability to sit, stand, walk, lift and carry will affect the claimant's ability to perform the jobs noticed by the rule (e.g. poor eyesight, impaired hearing, poor coordination, low I.Q., inability to bend and stoop frequently, environmental restrictions, etc.).

A vocational expert testifying in person can be cross-examined at a hearing and the factual and theoretical basis of his/her conclusions can be scrutinized by both the Administrative

Law Judge, the claimants and reviewing courts in determining whether or not there is substantial evidence to support conclusions of non-disability. [4] This is not changed even though the grids supposedly "use extensive information that a vocational expert would utilize", Kirk v. Secretary of H.E.W., 667 F.2d 524, 529 (6th Cir. 1981). A table cannot be cross-examined, and the factual presumptions upon which the table is based cannot be scrutinized by either the Administrative Law Judge or by the court. This deprives the courts of the power to perform their

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[4] This is not to say that the live testimony of a vocational expert is necessary in all cases. It is, however, the preferred method of producing evidence, O'Banner vs. Secretary of H.E.W., 587 F.2d 321, 323 (6th Cir. 1978), Garrett vs. Richardson, 471 F.2d.589, 603-04 (8th Cir. 1972), Hall vs. Secretary of H.E.W., 602 F.2d 1372, 1377 (9th Cir. 1979).

function, claimants of due process of law,[5] and violates the Social Security Act, and the Administrative Procedure Act.

c. The Use of the Grids to Deny Disability Deprives Claimants of Their Constitutional Right to Examine All Evidence Used In Adjudicating Against Them.

As has been shown, the grids involve taking administrative notice of

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[5] ". . .a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th amendment." Heiner v. Donnan, 285 U.S. 312, 329 (1932).

42 U.S.C. 423 speaks "in terms of the bonafides of the parties", but administrative regulations and policy under the grids makes "plainly revelant evidence of such bonafides inadmissible." Weinberger vs. salfi, 422 U.S. 747, 771, 772(1975).

certain unknown factual presumptions which are neither introduced at the hearing nor spread upon the record at any other time. This not only makes a nullity of 42 U.S.C. 405(b), which requires that decisions be based only on "Evidence adduced at the hearing", "No clause, sentence or word should be rendered superfluous, void, contradictory or insignificant", Ruiz vs. Morton, 462 F.2d 818 (9th Cir. 1972), aff'd, 415 U.S. 119 (1974), but also violates accepted principles of constitutional law. This type of administrative adjudication has been unequivocally condemned in the past. "The right to cross-examine has ancient roots. It finds expression in the sixth amendment...This court has been zealous to protect those rights from erosion not only in criminal cases but also in all types of cases where administrative and

regulatory activities are under scrutiny. Green vs. McElroy 360 U.S. 474, 496, 497 (1959). As this Court stated in a similar situation,

> a hearing is not judicial, at least in any adequate sense, unless the evidence can be known...All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' of a fair and open hearing be maintained in its integrity...There can be no compromise on the footing of convenience or expediency or because of a natural desire to be rid of harrassing delay, when that minimal requirement has been neglected or ignored. Ohio Bell vs. P.U.C. 301 U.S. 292, 304, 305 (1937).

It is submitted that, in operational effect the grids do exactly

that which was so condemned in Green, Ohio Bell and I.C.C. vs. Louisville N.R. Co., supra. The Secretary's statements that he has taken notice of job lists, without specifying what facts, from what lists he is noticing, is just as abusive as the procedures condemned in the cited cases.

d. The Grids Violate the Social Security Act by Depriving Claimants of an Individualized Determination of Eligibility.

Since the inception of the Social Security Disability Program in the 1950's, reviewing courts have consistently held that the act requires each claim be adjudicated individually and have consistently rejected the application of an "average person" standard. Dunn vs. Folsom, 166 F.Supp. 44, 48 (D.C. Ark. 1958), Klimaszewski

vs. Fleming, 176 F.Supp. 927, 931 (E.D. Penn. 1959).

Hodgson vs. Celebrezze, 312 F.2d. 260 263 (3rd Cir. 1963) cited with approval Sobel vs. Fleming, 178 F.Supp. 891 (E.D. Penn. 1959), which stated at 894: "The act is concerned not with a standard man of ordinary and customary abilities but the particular person who may claim his benefits and the affect of the impairment upon that person, with whatever abilities or inabilities he has." See further Lipppert vs. Ribicoff, 215 F.Supp. 28 at 34 (N.D. Cal. 1963).

This concern that claims be individually adjudicated has continued unabated throughout the history of the act, e.g.: Polly vs. Gardner, 364 F.2d. 969 (6th Cir. 1966), Lightfoot vs. Matthews, 430 F.Supp. 620, 621 (N.D. Cal. 1977), Hall vs. Secretary of

H.E.W., 602 F.2d. 1372, 1376 (9th Cir. 1979).

A requirement of an individualized determination finds it roots in the very language of the act itself. Snelling vs. Ribicoff, 198 F.Supp. 432, 437 (E.D. So Carolina 1961).

> The very wording of §223 of the Social Security Act, (42 U.S.C. §423) makes the point most strongly that each case and each person must be considered individually. That section sets forth that "every individual who meets the requirements and is under a disability shall be entitled to a disability insurance benefit.

That court could have further noted that 42 U.S.C. 423(d)(2)(A) repeatedly uses the personal pronoun in defining what it means to be "under a

disability": "if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot, considering his age, (his) education and (his) work experience..." (Emphasis Added). This intent is even more clear when the Social Security statute is contrasted with 38 U.S.C. 502 (the Veterans Administration non-service connected disability statute) where an "average" standard is used to define total disability as "any disability which is sufficient to render it impossible for the average person to follow a substantial, gainful occupation" (38 U.S.C. 502(a)(1)) or as "any disease or disorder determined by the administrator to be of such nature or extent to justify determination that persons suffering therefrom are permanently and totally disabled". 38

U.S.C. 502(a)(2) (Emphasis Added).

It should, therefore, be abundantly clear that Congress knew exactly what it was doing when it enacted the Social Security Disability statute and that any effort to apply an "average person" standard or which fails to completely assess the individual claimant is contrary to the act and should not be tolerated.

The grids, however, do not allow for individualized decision making. Instead they are based on major functional and vocational patterns and presumed gradual deterioration of vocational capabilities, 43 Fed.Reg. 55351-55354 (1979). They are based on standards and have a standard application, as this comment by the then acting director of Social Security shows:

> However, it must be recognized that

> it would be impossible to administer the Social Security Disability Program without guides and standards...The rules in Appendix 2 represent such standards and provide all adjudicated levels and regulatory structure for assuring a more equitable uniform assessment of individuals with similar factors wherever in the country they may file a claim...43 Fed.Reg. 9290 and 9291 (1978).

It is submitted that the concept of "uniform assessment" is merely an inappropriate euphemism for "standardized assessment" and a lack of individualized determination. A look at the rules themselves demonstrates that they are based on an "average person" standard and that the decisions under them turn on whether or not a

theoretical claimant has the ability to engage in substantial, gainful activity. At 20 C.F.R., Chapter III, Part 404, Sub-Part P, Appendix 2, Table 1, Rule 201.23 regulations state that a 44 year old claimant who is limited to sedentary work, is illiterate or cannot communicate in English, and has a history of unskilled work is considered not disabled. That same table when applied to the same person at age 45 (Rule 201.17) would direct a conclusion that that he/she is disabled. This clearly demonstrates the existence of some sort of "average" against which disability determinations are to be adjudicated.

Although the history surrounding the promulgation of the regulations demonstrates the view that the regulations will: (1) insure that disabled individuals receive uniform and

equal treatment from the agency; (2) provide claimants with a better understanding of the disability program; (3) provide a more workable framework for congressional oversight of the program, 43 Fed.Reg. 55351-55359 (1979). It is equally clear that these objectives may not be attained by promulgating rules which are to be applied mechanically in direct contradiction to the Act's requirement that each claim receive an individualized adjudication.

## II. THE GRIDS CONSTITUTE A SUBSTANTIVE CHANGE IN THE LAW.

In order to prevail under the grid system, a claimant is required to "prove a negative", in that he is required to produce national jobs lists at the hearing and individually and specifically negative his ability to perform each and every one of the jobs

listed. In the past, the courts have roundly condemned any intimation that this was the claimant's burden. Hayes vs. Celebrezze, 311 F.2d 648, 654 (5th Cir. 1963); Underwood vs. Ribicoff, 298 F.2d 850, 854 (4th Cir. 1962); Thomas vs. Celebrezze, 311 F.2d 648, 654 (5th Cir. 1963).

"When the claimant could no longer even shuffle dominoes, he was not required by the use of a catalogue of the nation's industrial occupations to go down the list and verbally negative his capacity for each of them, Butler vs. Fleming, 288 F.2d 591, 595 (5th Cir. 1961). It further appears, however, that even if the claimant were sophisticated enough to embark upon such a course, the evidence introduced, if admitted, would be ignored. Interim Circular 102, Bureau of Hearings and Appeals Handbook states as follows:

Caution should be exercised by the ALJ not to solicit, from a VE, information or testimony which conflicts with a conclusion stated in the rules. Such VE testimony would be irrelevant, since the regulatory rules are controlling. (Interim Circular 102 at page 20. (Emphasis Added).

If the claimant or representative wants a VE to be called to testify at the hearing...the ALJ should refuse such request. The ALJ should inform the requester that in view of the facts of the case, the VE testimony would not be relevant, since the regulations are binding. (Interim Circular 102 at page 23.) (Emphasis Added).

At a hearing where a claimant or representative wishes to question a VE as to the conclusion stated in

the rules, the ALJ should permit such questioning. However, the ALJ should caution the claimant or representative that the vocational regulations are binding on the ALJ. (Interim Circular 102 at page 23) (Emphasis Added).

This indicates that, in operational effect, the grids themselves go far beyond a mere procedural change and are in their very essence an unauthorized substantive change in the law whereby the Secretary has rewritten the definition of disability to exclude from coverage those persons for whom the chart would direct a finding of "not disabled", regardless of any factual showing on the record.

## CONCLUSION

It is respectfully submitted that for the foregoing reasons, the grids, standing alone, without specific

vocational evidence cannot support a denial of disability and that the decision of the Court of Appeals for the 2nd Circuit should be affirmed.

Respectfully submitted,

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LOIS STRAIN
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By
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Attorneys for Amici Curiae

## PROOF OF SERVICE

I, DAN STORMER, certify that on this day, November 12, 1982, true and correct copies of the foregoing were mailed, pursuant to Rule 28, Rules of the Supreme Court of the United States, by United States mail, to:

John Gay
Brooklyn Legal Services Corp.
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Brooklyn, New York 11201

Toby Golick
Legal Services For the Elderly
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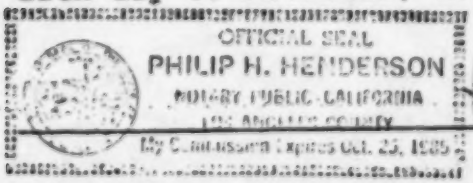
Rex E. Lee
Department of Justice
Washington, D.C. 20530

DATED: November 12, 1982

DAN STORMER
Attorney of Record for
Amici Curiae

Subscribed and sworn to before me this 12th day of November, 1982.



# Docket Sheet

| NO. 81-1983-CFX | TITLE | Richard S. SCHWEIKER, Secretary of Health and Human Services, Petitioner<br>v.<br>Carmen Campbell |
|---|---|---|

| DOCKETED | COURT |
|---|---|
| Apr. 26, 1982 | United States Court of Appeals for the Second Circuit |

| DATE | PROCEEDINGS AND ORDERS |
|---|---|
| | Counsel for Petitioner: Solicitor General |
| | Counsel for Respondent: |
| Apr. 26, 1982 | Petition for writ of certiorari filed. (RECORD FILED). |
| May 28, 1982 | Motion of respondent for leave to proceed in forma pauperis, and brief in opposition filed. |
| June 1, 1982 | DISTRIBUTED. 6-17. |
| June 14, 1982 | Reply brief for the petitioner filed. (D). |
| June 21, 1982 | The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED. |
| | --- |
| July 30, 1982 | Order extending time to file the joint appendix and petitioner's brief on the merits until Sept. 4, 1982. |
| Sept. 8, 1982 | Order further extending time to file the joint appendix and petitioner's brief on the merits until Sept. 20, 198 |
| Sept. 23, 1982 | Brief for the petitioner filed. |
| Sept. 23, 1982 | Joint appendix filed. |
| Oct. 7, 1982 | Order extending time to file the respondent's brief on the merits until Nov. 12, 1982. |
| Nov. 12, 1982 | Brief, amicus curiae, of The Gray Panthers filed. |
| Nov. 16, 1982 | Brief, amici curiae, of Tulare/Kings Counties Legal Services et al. filed. |
| Nov. 15, 1982 | Brief for the respondent filed. |
| Dec. 14, 1982 | CIRCULATED. |
| Feb. 18, 1983 | Reply brief for the petitioner filed. (D). |
| Feb. 28, 1983 | ARGUED. |